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JUDGMENTS OF THE SUPREME AND OTHER COUR

OF

MAURITIUS,

EDITED

BY A. PISTON, ATTORNEY AT LAW.

1869

BANKRUPTCY COURT.

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CESSION DE BIENS,—DEMANDE EN LIBÉRATION DÉFINITIVE.

La Cour n'accordera de décharge et libération définitive au débiteur qui a fait une Cession de biens que lorsque ce dernier prouvera que ses dettes sont le résultat de circonstances entièrement en dehors de son contrôle.

Celui qui a acheté une Propriété Sucrière en comptant sur les produits de cette propriété pour payer une majeure partie de son prix n'est point dans les conditions voulues par la loi pour obtenir de la Cour une libération définitive.

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CESSIO BONORUM,—MOTION FOR A FULL DISCHARGE.

The Court will not grant a full discharge to the debtor who has made a Cessio Bonorum, except when the latter shall prove that his misfortunes are due to circumstances beyond his control.

A party who purchases a Sugar Estate, relying on the proceeds thereof to pay a large portion of his purchase price, is not within the provisions of the Local Law to obtain from the Court a full discharge of his debts.

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CESSIO BONORUM ADRIEN FADUIL

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Before:

The Honorable LÉON ARNAUD, Acting Puisne Judge.

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L. ROUILLARD,—Of Counsel for Petition
J. BOUCHET, —Petitioner's Attorney.

—

4th June

This is a Petition praying for the full dis by a debtor, of all his liabilities. The Pe was a Planter, who, it appears, had be cessful on a small scale and had realize tain sum of money, as a Planter. He alt position and purchased a Sugar Estate proportion of three fourths for himself. transaction he invested the money he had as a Planter at "Trois Ilots" and which inherited; some thirty thousand dollars ther. In this transaction he lost all he h appeared before the Court, for a Cessio Bo with liabilities to the amount of $88,000.

Under these circumstances I am of that the application cannot be granted.

The law which allows a debtor to obta the Court a full discharge, lays very st conditions to the granting of such a dis and its provisions are so framed, that it la

the debtor the obligation of proving much more than his honesty, but such a condition of things, such a concatenation of facts that, from them, the Court cannot but infer that his misfortunes are due to circumstances beyond his control. In this case the Petitioner bought an Estate which he had not the means of paying and he relied for the payment of the larger portion of his price, upon his skill as a Planter, upon his future prospects as to amount of crops, sale-price of produce and on the absence of unforseen contingencies.

This was a speculation, one which may be very common in this country and may possibly be made under very safe conditions sometimes; but clearly, a man who incurs a debt which he cannot presently pay, but undertakes to pay out of the profits which he expects to derive from the object he has purchased, makes a speculation and it is difficult to say that a person who speculates and borrows money on the success of his speculation, has in his favor a reasonable and probable ground. One thing it is to make a very legitimate speculation, and honestly to work for the fulfilment of engagements taken under it; another thing it is to incur a debt which on expectations resting not upon future and prospective, but some real and substantial means of payment from which he may be frustrated by losses beyond his control.

This is not the case here, and however satisfied I am, that the conduct of the Petitioner has been straight forward and honest, yet I am of opinion that he incurred debts on expectations which were too far removed from him to form the basis of reasonable calculations, and that, moreover, his losses are partly attributable to unskilfulness in the management of the concern in which he had invested his capital, that is, the management of the Estate *Trois Cascades*. I therefore refuse to grant the Petitioner a full discharge of his debts.

BANKRUPTCY COURT.

CESSION DE BIENS,—APPEL D'UN JUGEMENT DU JUGE-COMMISSAIRE.

La Cour n'accordera de décharge et libération définitive au débiteur qui a fait une Cession de biens que lorsque ce dernier prouvera que ses dettes sont le résultat de circonstances entièrement en dehors de son contrôle.

Celui qui a acheté une Propriété Sucrière en comptant sur les produits de cette propriété pour payer une majeure partie de son prix n'est point dans les conditions voulues par la loi pour obtenir de la Cour une libération définitive.

CESSIO BONORUM,—APPEAL FROM A JUDGMENT OF THE JUDGE COMMISSIONER.

The Court will not grant a full discharge, to the debtor who has made a Cessio Bonorum, except when the latter shall prove that his misfortunes are due to circumstances beyond his control.

A party who purchases a Sugar Estate, relying on the proceeds thereof to pay the large portion of his purchase price is not within the provisions of the Local Law to obtain from the Court, a full discharge of his debts.

CESSIO BONORUM ADRIEN FADUILHE.

Before:

His Honor Sir C. F. SHAND, Chief Judge, and His Honor Mr. JUSTICE COLIN.

HON. H. KŒNIG,—Of Counsel for Petitioner.
J. BOUCHET, —Petitioner's Attorney.

19*th February* 1869.

On the 4th June last, the learned Commissioner in the Court of Insolvency below, found the Petitioner entitled to the benefit of a discharge under Ord: No. 23 of 1856, on his granting an assignment of all his real and personal estate and effects for the benefit of his creditors, in common form.

The effect of this decree was to protect the Petitioner, as usual, from personal execution for his debts; but a full and absolute discharge of all his liabilities, under Ord: No. 14 of 1864, was refused by the Judge.

The Decision of the learned Commissioner, so far as it did not give this full and complete discharge, was brought under revision of the Court by the present appeal.

It appeared from the Balance Sheet of the Petitioner, that his debts and liabilities amounted to $ 88,814.35 c. while his assets, including the price of his real estate sold by forcible ejectment, reached the sum of $ 66,950, leaving a deficiency of $ 21,864 35 c. Neither the official assignee nor any of the Creditors appeared before the Court to oppose the appeal, while some of the Creditors with claims amounting to $ 6,589.11 c. consented to give him a full discharge, so far as they were concerned.

THE HON: KŒNIG. for the appellant. I am quite aware that before I can succeed in my demand, I must satisfy the Court not only of my clients good faith and honesty in all that he has done, but also that he has established by proper proof all the requisites of the Ordinance No. 14 of 1864 which, for the first time, introduced the principle of full and complete discharges in actions of *Cessio Bonorum*. No one has contested the honorable conduct of Mr. Faduilhe. No creditor has opposed him, and in fact, he has got the usual discharge from the chance of imprisonment from the Judge Commissioner, which could not have been granted unless the Petitioner had established his perfect honesty and good faith.

Formerly it was impossible, in actions of this description to get a full discharge, altho' insolvent traders were in more favorable position, but the law was changed in 1864 by Ord. No. 14 of the year. (Reads Art. 14 of the Ordinance.) I submit that the Petitioner has proved all the points of his case.

There was no commencement here with fictitious capital, for $30,000 were paid down of the gross sale price of the Estate, which the Petitioner purchased. To insist that the whole sale price should be paid is not the practice in this Colony. Such a thing never occurs. In the circumstances in which Mr. Faduilhe stood he had certainly a reasonable hope of paying the whole price, for the witnesses examined on his part, among others the Honorable Mr. Arbuthnot and the Hon. Mr. Pitot, concur in stating that he cultivated the Estate with much diligence and assiduity; that his personal expenses were small; that his want of success arose from the difficulty of working a new Estate without good roads; that he was unfortunate as regards the health of the animals on the property, and some of the dependencies of the property were accidently burned down during his occupancy, to his great loss. I submit that all the elements required by law for a full discharge concur in this case, and that the law would become a dead letter if a discharge were not granted.

THE COURT.

The proceeding by way of *Cessio Bonorum* which has been borrowed from the Roman Law by many countries, for the relief of insolvent debtors, does not confer on the Petitioner when he is successful an absolute discharge from all his debts and liabilities. It merely protects him from imprisonment. It lays upon him, in the first place, the burden of shewing that his incapacity to pay his creditors has arisen from misfortune, and not from any fraud or misconduct on his part. Thus, in the law of France from which we have directly drawn our "Cession des Biens," it is declared: C. C. Arts. 1268, 1269 et 1270.

1268. "La cession judiciaire (and that is the species of "cession de biens" with which we have here to deal) "est un bénéfice que la loi accorde "au débiteur malheureux et de bonne foi, auquel "il est permis, pour avoir la liberté de sa per-"sonne,de faire en Justice, l'abandon de tous ses "biens à ses créanciers, nonobstant toute stipu-"lation contraire."

1269. "La cession judiciaire ne confère point la propriété aux créanciers; elle leur donne seulement le droit de faire vendre les biens à leur profit, et d'en percevoir les revenus jusqu'à la vente."

1270. "Les créanciers ne peuvent refuser la cession Judiciaire, si ce n'est dans les cas exceptés par la loi.

"Elle opère la décharge de la contrainte par corps."

"Au surplus, elle ne libère le débiteur que jusqu'à concurrence de la valeur des biens a nés; et dans le cas où ils auraient éte ins s'il lui en survient d'autres, il est obligé abandonner jusqu'à parfait paiement."

By the Ordinance No. 14 of 1864, a was introduced into our Law. By § 14 Ordinance, it was declared that the Co grant a full discharge of all the Petitione prior to the filing of his Petition, on th vent satisfying the Court that he did n on his business by means of fictitious that at the time when his debts were co he had a reasonable or probable ground c tation of being able to pay the same; tha solvency is not attributable to rash or h speculation or to unjustifiable extravag living or to gambling, and that he has guilty of any fraudulent devices in relati affairs.

It will be observed that the pow to the Court by this new law is merely sive, and that the whole and very onerou of establishing the position in which, al discharge can be granted is laid upon t tioner.

It will be remarked, further, that th ments on this subject, by the above sect very special and very stringent: nor is t wondered at. The Petitioners in Cessi rum are not at all in the same situation chants and traders. The Law imposes u latter class of persons obligations as to duct of their affairs, among others the k certain business books, the striking of p balances, and the observance of the rules of commercial dealing. From th er or the party not engaged in t whom the relief by way of *Cessio* is open, the law has not been so exact therefore, unless the case falls within special circumstances set forth in the A Ordinance above quoted, no full and charge of all his debts can be granted. plainly, not be reasonable that a Plante be allowed to speculate deeply in a Sug with the money of other persons and prospect that if his speculation did not he should nevertheless get a full discha be quit of all his debts, and be little v than before. Now, was there speculati present case and was that speculation and hazardous character.

It appears to us that it was. The the Petitioner was certainly not fictitio sense that he had no capital at all, for, edly, he invested in this sugar plantati $30,000, but the whole price which h himself to pay was much greater and, o over and above the price; large additio were required for the working of the These, of necessity, had to be borrowed upon the produce of the Estate, as the s he had to enable him to liquidate his was, certainly, bearing in mind all th gencies to which sugar growing is e very hazardous experiment. may true that such experiments are very o in this Colony, but it is equally true

very rarely succeed, and we are satisfied that the legislative never intended that a full discharge of all his debts should be given to a Petitioner who had made a great venture or speculation in the cultivation of sugar, whose success depended so much upon the chance of happy accidents, entirely beyond his own control. We do not, therefore, think that such a case is within the law for a full and final discharge, and this appeal must stand dismissed.

SUPREME COURT.

FOLLE ENCHÈRE,—DÉPÔT,—CAUTION.

L'acquéreur d'un Immeuble, vendu par voie de Licitation devant le Master de la Cour Suprême, se trouvant menacé d'éviction par une nouvlle vente du même Immeuble, poursuivie par voie de Folle Enchère contre les parties entre lesquelles a été poursuivie la Licitation, a obtenu de la Cour la restitution de la somme qu'il avait déposée devant le Master, lors de son adjudication, sauf à donner caution pour les comptes qu'il pourrait avoir à rendre en raison de la jouissance qu'il a eue du dit Immeuble, du jour de l'adjudication tranchée en sa faveur.

"FOLLE ENCHÈRE,"—DEPOSIT,—SECURITY.

The purchaser of an Immoveable Property sold by way of Licitation before the Master of the Supreme Court, being exposed to eviction on account of a new sale of the same property prosecuted by way of "Folle Enchère" against the parties to the first Licitation, has been allowed by the Supreme Court to claim back the amount of his purchase price deposited by him at the office of the Master, on the day of the sale, but subject to his giving security for any accounts that he may be ordered to give in consequence of his having received the proceeds of the Estate from the day of his purchase.

MALLET,—Appellant,

versus

HAREL & ORS.,—Repondents.

and

CASTILLON,—Appellant,

versus

HAREL & ORS.,—Respondents.

Before:

His Honor SIR C. F. SHAND, Chief Judge, and His Honor Mr. JUSTICE COLIN.

E. PELLEREAU, —Of Counsel for Appellant,
J. MERCIER, —Appellant's Attorney,
HON. L. ARNAUD,—Of Counsel for Respondents,
W. HEWETSON, —Respondents' Attorney.
G. GUIBERT, —Of Counsel for Castillon.
E. LAURENT, —Attorney for same.

19th February 1869.

By a Judgment of this Court, under date the 24th December 1868, affirming an Order of the Master, of 5th October 1868, it had been held that Antoine Mallet, a creditor holding an unpaid "Bordereau de Collocation" upon the price of the Estate *Fontenelle*, sold by Licitation and adjudicated to one Léonard Castillon, had the right to cause the said Estate *Fontenelle* to be resold by "*Folle Enchère*," and was not barred from so doing by the fact that Arthur Harel had purchased the same Estate upon the forcible ejectment of Léonard Castillon, for a sum smaller than Castillon was bound to pay.

The ultimate result of that decision being that Harel would be ousted from the Estate, Harel applied to the Master for an Order whereby a clause would be inserted in the conditions of sale, to the effect that the sum of money deposited by Harel, at the time of his purchase part of which had been paid over to the sequestrator of the Estate, should be paid back to him by the new purchaser, upon the *Folle Enchère*.

Harel had been in possession of the Estate since 18th September 1867; the day after he purchased and had received two crops; and before the Master, Mallet and Antoine Castillon objected to Harel's application upon several grounds which the Master's decision reviews. The Master, on the 7th January last past, granted Harel's prayer and ordered that a clause should be inserted in execution of which the purchaser of the said Estate should be bound to reimburse cash, and at the very time of the adjudication, to Arthur Harel, the sum of $14831 57 c. being the difference between the sum deposited by him and that now remaining in the hands of the Master. The Master further leaves to Mallet the power to proceed, when he shall think proper, to the *Folle Enchère* of Léonard Castillon to pray for subrogation into the proceedings begun by Mallet. The Master then proceeds to order that Harel's costs shall be paid ½ by himself and ½ by Antoine Mallet, Antoine Castillon and the heirs Vaudières.

Against the Master's Decision, Mallet has appealed:

Antoine Castillon has also entered a separate appeal; we now deal with the appeal entered by Mallet, to which Castillon is a party and in the discussion of which he took an active part, essentially on the same side as Mallet.

In this Court Eugène Bazire intervened for Emile Bazire, also a collocated creditor of Léonard Castillon and joined Mallet &c., &c.

It seems to us that a good deal of the arguments laid before us on behalf of the Appellant, is

premature and whatever may be its value, when the question of accounts or no accounts to be given by Harel arises, and of such value we give no opinion, it has no application in the cause as it comes up to us.

The main point insisted upon by the Appellant, before the Master and before us, is this, that although the sale to Harel being annulled by the *Folle Enchère*, Harel ought to be reinstated in the position he held before the sale; yet as he has received the produce of two successive crops, he ought to account for those crops before he receives his money back.

That argument would necessarily raise the point of Harel's good faith; because if he was of good faith during his tenure and user of the Estate, he has not to account for his produce. But that question of accounts did not arise before the Master; it could hardly arise before the sale to Harel was actually annulled by the operation of the complete *Folle Enchère*; it would not arise at all if the inchoate proceedings for *Folle Enchère* were given up.

And therefore we find that, before the Master, the Appellant Mallet reserves his rights to bring an action for accounts; therefore the claim is not embodied in the defence to the application made by Harel; therefore we cannot deal with it; therefore we are left in this position, an usual and elementary position in cases of cancellation of sale, that if the Estate is taken way from the purchaser, by the annullation of the contract, the parties to the contract ought to be placed in the same position that they held before.

Prima facie, therefore, if Harel is compelled to give up the Estate, his money ought to be returned to him.

The rule of law is that if damages be due for degradations, for instance, or if the vendor be entitled to obtain damages on account of unpaid interest upon the unpaid purchase price, such damages should be set-off against the sum which is to be reimbursed to the evicted purchaser. It would be hard upon the vendor if the purchaser enjoyed, at the same time, the fruits of the Estate and the interest of the unpaid price of the Estate, and the Courts have power, says TROPLONG, *Vente*: II p. 126 " de venir au secours du vendeur et de rétablir le niveau entre les fruits et les intérêts."

But to decide a question of this kind, now, would be going *ex-via*; for the main point out of which all secundary points will arise, the good faith or bad faith of the purchaser Harel, and therefore his liability or non liability to account for the " fruits," deducting expenses, is first reserved by the Appellant in his exceptions, and then reserved by the Master.

If Harel be held, when the case arises, to have been of bad faith, he is liable to account for the fruits, and the question of interest falls to the ground; if he is held to have been of good faith, the question of interest due may or may not then arise, but it has not arisen and cannot well arise so long as the parties have reserved and stand by these reserved rights of trying the first in a special action.

We were pressed by Mr Pellereau learned counsel who sided with him, the question of good faith, on the gr Harel well knew that a *Folle Enchère* n him out of the Estate, but on Mr P own statement, before the Master, we deciding *ultrà petita* if we entered into tion. It may be a matter of regret Court is not in a position to decide matters, finally; but we cannot alter, good cause, the position assumed by th and we find no good cause for altering i

It was also urged with what may b *nimia subtilitas* that the sum of mone the sequestrator was advanced by the s tor, to keep up the Estate, and therefore of the expenses of the Estate and shoul sidered as one of the items of the accou Harel may be called upon to give.

We cannot sustain this theory; if H an account to give, that account must b user of the Estate, and beginning from when he took possession; the sum paid sequestrator was a privileged claim w the conditions of sale, he was bound t before he received the seizin of the E bought, which he paid in obedience to t tions of sale, as he would have paid made, by such conditions, payable, as a dent condition to taking possession; it part of his administration; it is true Estate thus kept up by the sequestrator to yield a crop, which Harel realized so his seizin; but, on the other hand, a p who buys an Estate with a crop, will gi money for it than for the same Estate w crop, and, at any rate, all such consi cannot change the nature of the claim Harel as a condition to his purchase.

We have no doubt, either, that the sequ claim was rightly made payable, as a p claim by the conditions of sale; but whet ly or wrongly made payable, as a matte it was made payable, no one objected, n pealed against the Judgment of adjudica if Harel is now evicted, he ough to rece a sum thus paid as part of the consider the purchase of the Estate, which is n taken away from him.

A case was cited (*Legros* v. *Syndic* S. V. 33.1.669, in which a vendor wa ed not to repay to the purchaser t he had received on account, inasmuch as chaser was bound to make good the de value suffered by the property sold, an authority of that case we were asked the confusion between sums due by H the fruits by him received as for interes case might be, and the sums to be reimb him upon his eviction.

We entirely concur with the law laid that case, the force of which is, eviden the Court will suffer no injustice to be a vendor, from a false application of a ru

Here, the vendor was allowed not to pay back at once the sum he had received, because it was clear that there had been "détournement, enlévement de portion des effets et marchandises faisant l'objet de la Pharmacie," and that, therefore, saving the actual amount of the sum due on that account by the purchaser to the vendor, it was proved that there was something due, proved also why it was due by the purchaser to the vendor.

There, again, the purchaser having been adjudicated a bankrupt, it would have required a stern rule of law to compel the vendor to pay a sum of money which had by the operation of confusion been discharged "jusqu'à concurrence" says the Judgment. Here the facts we find in that Judgment do not exist and would not warrant a similar conclusion. But that decision shows that cases may arise and have arisen when the repayment by the vendor of an estate, who obtains the cancellation of the sale of the portion of the purchase price which he had received, may be delayed until it has been ascertained what part of the same he may retain as a set off to his claims upon the purchaser. But this rule, like all exceptional rules, must depend upon special facts and will usually be made to operate under reasonable conditions.

In this case the Appellant has reserved to himself the right of bringing an action of account against Harel; according as that action will be successful or not, Harel will have to account for the fruits; the question of interest whether as interest proper or damages for having enjoyed at the same time the fruits of the Estate, and the interest on the unpaid portion of the purchase price, will be a matter for the consideration of parties, but can hardly arise until the reserved action is tried or given up.

It was suggested by the Respondent that there was not enough there to lead the Court to vary the Master's order, and that Justice should be fully satisfied if Harel gave security to make good any sum which he might be found liable; and under the circumstances we think the suggestion good.

Taking it as a broad and distinct rule that the purchaser who is evicted by resolution or cancellation of sale, *i. e.* by the annullation of his contract, ought, whilst giving up the Estate, to receive back the money he has received, (for otherwise the parties would not be placed in the original position in which they stood before the contract) we should require strong facts like those in the case just now commented upon to delay execution on one side, whilst it takes place on the other side; and we find no such facts here; but, at the same time, we think there is enough to show that Harel having on the one hand received crops, and, on the other, having not paid a large portion of the purchase price, it is perfectly possible that he may have something to repay for the ultimate benefit of the creditors secured on that Estate. And it is but fair that whilst receiving at once the money he has paid, he should give security for the money he may have to pay. The contingency is too remote to delay repayment to him, but not too remote to order that security be given.

We wish clearly to be understood to give no opinion as to whether Harel is liable to give accounts, or whether should he not be liable to give accounts, he is liable or not liable for interest under one name or another name. These questions have not arisen and although it has been necessary to glance at them in order to exhaust the case now before the Court, we do not give and we are not in a position to give an opinion upon them.

We shall therefore affirm the Master's order, with this proviso, that Harel do give good and sufficient security to the satisfaction of the Master, to the amount of £14,831.57 to meet all claims to which he may be found liable and arising out of the adjudication of the Estate *Fontenelle* to him, as the consequences thereof.

We reserve to the parties the same rights that the Master has reserved to them.

We think the costs in this Court should go as the Master has directed, they should be paid before him, except so far as the intervening party Bazire is concerned. We admit this intervention, but he shall have to support personally the costs of such intervention.

SUPREME COURT.

LIBELLE, — CALOMNIE, — ACTION EN DIFFAMATION, — RÉTRACTATION, — JOURNAUX, — RAFLE, LOTERIE, — DOMMAGES.

LIBEL, — SLANDER, — ACTION FOR DEFAMATION, — APOLOGY, — NEWSPAPER, — RAFFLE, — LOTTERY, — DAMAGES.

BOULANGER, — Plaintiff,

versus

LAFFITTE & ORS., — Defendants.

Before:

His Honor Sir C. F. SHAND, Chief Judge, and His Honor Mr. JUSTICE BERTEL.

L. ROUILLARD, — Of Counsel for Plaintiff.
G. A. RITTER, — Plaintiff's Attorney.
W. NEWTON, — Of Counsel for Defendants.
H. BERTIN, — Defendants' Attorney.

21*st April* 1869.

The facts and arguments of parties are fully stated in the Judgment of the Court.

Sir C. F. SHAND, C. J. — In this action the Plaintiff Aristide Boulanger, professor of music

in Port Louis, complained of certain passages in the *Feuilleton* of the *Commercial Gazette* of Mauritius, bearing the date of the 5th October 1868, but published on the day preceding.

The Plaintiff averred that portions of the article in question were a libel on his good name fame and character, and he asked £1,000 as damages in reparation for the injury which he said he had sustained from the publication in question. The parties called as Defendants in the action were Jules Lafitte, Cashier of the said news paper and the admitted author of the article containing the words complained of; Mrs Francis Channell printer and proprietress of the paper; and her husband Francis Channell for the validity of the proceedings and the authorisation of his wife, and also in his capacity of Editor of the paper.

The libel was in the French language, and in English reads as follows:

"I shall not here renew the praise so often and "so justly lavished on our creole pianist.

"At first sight one sees that he possesses his "piano.

"*An ill tongue.*—Is it the one that was put up "for raffle?

"*I.*—Who is that imprudent babbler?

"— You speak of his piano, I ask whether it "is the one that was three years ago put up for "raffle and which is not yet drawn altho' $800 "worth of tickets have been paid cash.

"— Away with you, venomous viper, the raffle "has been drawn and the piano won.

"— But there it is.

"— For this reason; that the party who won "it made a present of it to our pianist and I "would have done the same.

"— Strange! and who is that modern Me-"cœnas?

"— Ah Sir, you are getting indiscreet—please "apply elsewhere."

The Plaintiff averred the following *Inuendo* or meaning and intention of the Defendants in the said publication. By this false, scandalous, malicious, and defamatory libel the Plaintiff was and is exhibited to the public, first as having under the false pretence of the raffle of the said piano, raised a sum of eight hundred dollars cash and in the height of dishonesty as never having drawn the said raffle; and secondly as having had the said raffle drawn in some sham and spurious manner, and yet being in possession of the said piano, it having been presented to him by some unknown party alleged to have won the same at the raffle.

In answer to the Plaintiff's demand, the Defendants put upon record the following pleas:—1st. That they deny all the facts; 2o. That the said Plaintiff has no legal cause or right of action; 3o. That the Defendants are not guil grievances laid to their charge or any 4o. That the Plaintiff has suffered no d alleged; 5o. And for a further plea, th dants, protesting that they have never published wickedly or maliciously the libel laid to their charge; that on or a fifth day of October last past they *bona* blished in the *Commercial Gazette* the above complained of, which is nothing echo and almost verbatim reproductio rious reports and rumours then and th long before current among the public Louis and to which the said Plaintiff rectly or indirectly given rise, by u making a raffle of the aforesaid piano lecting money upon the said raffle, w kept several years without being dra by keeping the piano in his possession raffle had been drawn, without giving proper notice to every interested party raffle was being drawn or had been draw serting that an alleged proprietor of a ca tablishment had won the said raffle and present of the said piano valued at a dollars to him the said Plaintiff, and furt as soon as they, the said Defendants, formed that such publication had given to the Plaintiff they offered a suitable, pr sufficient explanation and apology, and did publish a proper and suitable explan apology to show that they had no int publishing the said feuilleton to publis against the said Plaintiff.

Both parties led evidence at con length.

Throwing aside some subordinate deta do not bear on the present enquiry, th rial facts for disposing of the case may l as follows:

The Plaintiff Boulanger was formerly chant in Port Louis. Some years ago his affairs became embarrassed and he into arrangements with his creditors, u Control of the Court of Bankrupcy, wh agreed to pay them a certain percentage debts, by instalments running over a p several years.

In the end of the year 1865 or begi 1866, Boulanger put out a written circul out date, stating that a grand piano fort at $1,000 was to be raffled for; the tick to be 100 in number, and to cost $10 the raffle was not advertized in the publ nals of the Colony, but Boulanger and hi were very active in procuring subscriber was shewn that in several instances perso ing on the *Place* or in the other public of Port Louis, were sollicited to take tick

We have it in evidence that raffles of cription are very common in Mauritiu witness describes them as a sort of little another stated that some people live by and there seems no reason to doubt th occasionally those lotteries are employed ritable purposes they are sometimes m texts for raising money, the subscription

ceived and pocketed, but the raffle remains undrawn. The lottery of the Plaintiff was very long in coming to a conclusion. The full number of subscribers was not obtained. On the 17th October 1867 a jocular reference was made to the great delay, in the *Sentinelle* newspaper. But the raffle was not drawn till the 8th January 1868.

Due notice had been sent round to all the subscribers, some 80 in number who had paid their subscription of $10 each. The drawing took place in the presence of a number of the persons interested, and a M. Pierre Justin Florent, the owner of a carting establishment, in Port Louis, gained the piano, but the instrument was not removed from the possession of Boulanger. Florent says that this arose from his drawing room being too small to hold it. He adds : "I told Boulanger that I would see if I could not have the piano exchanged for a smaller one or sold, and as he was an artist he might keep it in the meanwhile if the piano was not in his way and use it. Boulanger told me that he had two other pianos and if one of them suited me, he might make a bargain with me ; offers were made to me by several persons to purchase the piano. I do not remember their names now. I met Boulanger once or twice after that, I never spoke to him about the piano. I never claimed that piano. I never asked delivery of the piano from Boulanger. I sold the piano to Boulé who was acting for some one—this was in the month of November last, 1868."

Boulanger on the other hand maintained that Florent had made him a present of the piano. There is, we think, considerable grounds for believing from the evidence before us that Florent when he had gained the prize had spoken to the Plaintiff as an artist in complimentary and flattering terms. That the Plaintiff understood more than was meant is probable enough, for to the last he clings to the notion that Florent had made him a present of the piano and even insisted that this should appear in the public apology which he asked from the Defendant for the alleged libel, and which, as we shall see by and by, Boulanger would allow no one but himself to dictate.

Time passed on and it appears that although the raffle had been actually drawn as above mentioned, rumours were still afloat that the Plaintiff Boulanger had received $800 of moneycash,down, for tickets, but had never drawn the raffle.

He gave a public concert in the month of October last. The piano was still in his possession. He performed upon it at the concert. The Defendant Laffitte was present, and seeing the piano there, he asked one of the witnesses if it was the same instrument which had been put up for raffle, and was informed that it was.

It was immediately after this, that the feuilleton complained of appeared in the *Commercial Gazette*. Boulanger considered himself as deeply injured by the publication, and called for a retractation.

Both parties met with their friends regarding the terms of the apology, which it was then admitted on all sides, Laffitte ought to make in some shape or other as he had ascertained since the publication of the *feuilleton*, that the raffle had been fairly drawn 9 months before. Boulanger would accept of no other apology than the one written by himself, in which the Defendants were made to confess not only that the raffle had been properly drawn, at a meeting of the subscribers regularly called, but that Mr. Florent, the gainer, had made a present of it to Boulanger and consequently that the statements in the *feuilleton* were due to malevolence and calumny, and the Defendants humbly asked him (Boulanger) to accept their excuses both so far as the raffle and his own personal character were concerned.

The Defendants refused to accept and publish this apology, but in the number of the *Commermercial Gazette* issued on Saturday the 10th October, there appeared a note of the Editor stating that a formal Notice had been received from Boulanger, calling for a retractation of the statements in the feuilleton ; that the Notice had been sent to the author of the article who had replied in a letter which was printed below, stating that : " in presence of the Notice received from Boulanger, it was his duty to free the Editor from all responsibility of the action, that he could not give a retractation in the terms asked for on the other side, but that before the case is heard in the Court he owed an explanation to the public. That this explanation would be found clearly and distinctly set forth in a letter which he sent to the Editor, on the preceeding Monday, but which he had kept back that he might not appear to yield to threats, but now that legal proceedings are certain the same motive no longer existed and he had only one thing to do, viz : to establish his good faith to his readers.

The letter referred to is then inserted, it runs thus :—

" 5th October 1868.

" My dear Editor,

" You informed me that I have been led into error in speaking of certain rumours which are in circulation regarding Mr. Boulanger's Raffle.

" In setting me right you also set right the public for I only repeated "tout haut, ce qui se disait tout bas." If I have made myself the echo of a rumour which was without foundation, I owe it to truth as well as to yourself, who did not read my feuilleton before it was published, and lastly to myself, to remove the disagreeable impression (la fâcheuse impression) which my allusions may have caused.

" On receipt of your letter, I lost not a moment in obtaining precise information and the result is that the raffle of which I spoke has been regularly drawn.

" On principle I only speak what is true. Those who know me cannot doubt this ; accordingly I come forward, of my own free will, frankly and fairly to acknowledge the errors in the rumours which I mentioned, rumours which still circulated even on the evening of the Concert, but which, nevertheless, were of a much earlier date."

The jocular remarks are then added which appeared in the *Sentinelle* newspaper of date the 17th October 1867, on the delay in drawing the raffle of the *fameux piano à clavier de rechange.*"

It is in these circumstances that the present action has been brought by Boulanger, in which we have now to give Judgment.

The case was very fully argued on both sides of the Bar, and it may be as well in the outset to notice a plea put forward on behalf of his clients by the Defendants' Counsel, which he called a sort of exception or Demurrer. In a discussion of this nature, the truth of the charge brought by a Plaintiff is, in the meantime, assumed and the argument was of this nature. All lotteries or raffles and games of chance said the Defendant's Counsel are prohibited by our criminal Code, except the Government has expressly given its sanction to the parties projecting such schemes. Now, Boulanger does not even allege that he had the authority of Government for setting his raffle on foot, and as he, therefore, was deliberately breaking the law of the land, he voluntarily placed himself in a position of gross illegality and cannot come to a court of law, complaining of what the Defendants did, as he himself was flagrantly breaking the law in the matter in question.

In this exception of the Defendants, there is, we think, a mistaken view of legal principle. It is true that public gaming houses and lotteries are generally prohibited by Articles 335 and 336 of our Criminal Code, as dangerous to public morality and the well being of society. But it does not follow from this that raffles or lotteries of a much more private nature, and with a trifling payment by each subscriber, are equally marked with the stamp of illegality. At all events, neither here nor in England does the Government usually deem it worth while to take notice of such doings. It must not be forgotten that lotteries, after all, even in their public form were long tolerated in the most advanced communities and are only *mala prohibita*, not *mala in se*. But even were we to assume that Boulanger's raffle fell within the rule of the Criminal Code and was really an illegal thing, the arguments of the Defendants might have had its weight if Boulanger were endeavouring to call in the arm of the law to aid him in recovering the money promised by the subscribers, or otherwise to assist him in carrying out his scheme of a raffle. The legality of the project, itself, would then be a subject of most material inquiry, even if the argument of the Defendants as to the illegality of the raffle were well founded; this might be a sufficient reason for the authorities if they were so advised, stepping forward and moving for the punishment of the promoters.

But the question put in issue in the record now before the Court, is a totally different one. It is not even the case of the Defendants as public journalists and for the public good, pointing out that the Plaintiff Boulanger was breaking the law by making a lottery or raffle. It is a charge of slander brought by the Plaintiff against the author of what he alleges to be a defamatory article in a public newspaper and against the proprietor and editor of the paper, as all liable to him in reparation. Even were we to assume for the sake of argument the position most favorable to the defendants, vizt: that the Plaintiff in the matter in question was "*versans*" *in illicito* and was breaking the law regarding lotteries, that would give them a right, possibly enough, to warn him, that, in their opinion, he might be infringing the law, but not falsely say or insinuate in their journal that the raffle was not fairly gone about, that the Plaintiff was not acting honorably or in a straight forward manner in the conduct of his lottery. Suppose a person was actually breaking the laws of excise and carrying off a quantity of Rum without a permit, no one would be entitled with impunity to charge him with having got possession of the rum by dishonest means. It would be no defence in the action of defamation to allege that the Plaintiff was, himself, breaking the law, in some other respect; for, the issue of libel is one totally distinct and apart from the illegality laid at the door of the Plaintiff. This point therefore raised *in limine* of the discussion, and which was not very strongly pressed by the Defendants' Counsel, is not we think, one, that can successfully be urged by the Defendants as a bar to further enquiry, here.

We must now proceed to notice another and a very important part of the argument for the Defendants which was pressed with great zeal by their Counsel. It was contended that giving the article in the feuilleton, fair play, and reading it carefully from beginning to end, there was, really, no libel in it, at all. It was said that the *inuendos* of the Plaintiff are forced and constrained; that the whole thing is in a tone of pleasantry and bantering; merely putting in the form of a jocular dialogue the passing rumours and gossip of the day; that there is nowhere a positive assertion that Boulanger had not drawn the raffle and intended to pocket the money and keep the piano; that if it had been drawn, the fact which was visible to all the world, viz: that the piano was still in his posession, is, in the feuilleton, ascribed to the liberality of the person who had gained it at the raffle, and this is the very account of the matter which Boulanger, himself, has always given. No one could deny that a very long time had elapsed since the scheme of the raffle had been issued: it was *bona fide* delivered to the author of the *feuilleton* that the raffle had not been drawn, and the object of the article was merely to give a hint that the thing ought to be brought to a speedy conclusion. The Defendants submitted that it must be particularly noticed that at the conclusion of the remarks it is said: "I have only sketched this little picture as a study of what is going on around us "étude de mœurs," I have too high an esteem for our zealous artist to believe a single word of this contemptible gossip." If it was insinuated, as some readers might imagine, from one part of the article that Boulanger had not got a present of the piano from the owner, that was only the truth, as in fact, Mr Florent never presented it to him. The Defendants, here, admitting that they subsequently made a retractation, to a certain extent, argued that this could not be turned against them in this part

of the case, as the feuilleton must be judged of as at its date and as things then stood. In their apology they stated that they merely wished to disabuse the minds of the persons who might have carelessly or ignorantly attached more importance to the article than the Defendants have intended.

This question of libel or of no libel is, of course, an all-important one in such a case as the present. We have not, as in England, the advantage of the assistance of a Jury, and we must perform the double duty of Judges and Juries as we best may, now.

Now, in the first place, we are clearly of opinion that the words of the "Feuilleton" must be taken in their plain usual grammatical sense and the import and meaning of the article must be held to be that which an ordinary reader of a newspaper would attach to it. The witnesses, generally, who were examined on this point, have stated that the perusal of the article, created in their minds a very painful impression. They understood that the character of Boulanger was seriously impeached and disparaged by the Feuilton. Without attaching any undue importance to the opinions thus given us by those witnesses, and judging of the matter for ourselves, we are of opinion that the words used, *de prima facie* amount to a libel; for, in law, every publication is a libel which tends to asperse the character of an individual, or to expose him to the ridicule, hatred or contempt of his fellow citizens. For such a publication, the author and publishers will be liable in damages to the injured party, unless they can shew that they stood in what is called a privileged situation, *i.e.* that they were entitled to speak of the matter and of the person alluded to. For example, all public measures and public men, in their public capacity, are open to the criticism of those around them. But the criticisms must be founded on facts well ascertained, must be fair in tone and temperate in expression, and made for the benefit of the public and not for the purpose of giving vent to private spites or personal dislike.

But, farther, we should be sorry to hold that the Public Press oversteps its sphere of duty when it keeps a steady eye on impostors of every description, who are attempting to dupe and cheat the public. But before launching their warning against such persons, it is indispensable that the writers in public newpapers, should make due and careful inquiry into the facts, and that they should be sure of their ground or at least have taken all reasonable means to obtain full and accurate information on the subject, before using the great power which their position gives them, for good or for evil.

How far the Defendants are entitled to plead privilege from their own position or that of the Plaintiff, and how far they may be able to excuse themselves altogether or extenuate their conduct in the actual circumstances of the case, we shall now proceed to enquire.

The Defendants contended that as public journalists, it was not only their right but their duty to animadvert upon all matters of public concern or in which the community are interested. That Boulanger's Raffle was really a public one and that all raffles were prohibited by law (6 Geo. 4. C. 60); that raffles and lotteries were becoming quite a nuisance in Mauritius; that rumours were rife among the community and reached the Defendants, even from persons who ought to have been the best informed, that Boulanger never had drawn his raffle. That, in point of fact, he was found still in possession of the identical instrument at the Concert given by him on the 2nd December 1868 more than 3 years after the circular for the raffle had begun to be handed about; that they (Defendants) *bonâ fide* believed that the Raffle had never been drawn; that they had no intention to defame Boulanger, but in the circumstances were justified in calling attention to the matter in their public Journal. That in several late cases in England, the law in favor of the Press had been laid down by the Judges, in very broad terms, but quite in consistency with the progress of free institutions and the interests of modern Society.

Reference was specially made to the summing up of Lord Chief Justice Cockburn in the case of *Hunter* v *Pall Mall Gazette*, in 1866, and to the subsequent case of *Campbell* v *Spottiswoode* (Saturday Review.) In the former proceedings it would appear that the Jury gave the Plaintiff one farthing damages, being satisfied, the presiding Judges having summed up very strongly for the Defendants, that tho' the law had been violated, the conduct of the Defendant was all but completely warranted by the facts of the case. In the latter case the Jury found a verdict for the Plaintiff with £50 damages as the charges against the Plaintiff were shewn to be false altho' the Defendant appeared to have acted in good faith. So far as we have been able to gather the import of the opinions of the Judges as shewn in the cases referred to, there is nothing with which we should not readily concur. But we must speak with a certain reserve as unfortunately the cases do not appear in the ordinary Law Reports of the period. Possibly this may arise from their not having gone further than the trials at *Nisi Prius*.

We are very sure that no British Court of Justice will ever put any restriction on the Press, so far as fair comments on public men and public matters are concerned, or even when the persons complaining of having been libelled are not within any department of the public service, but where there is sufficient reason to believe that when they obtrude themselves upon the public they are actually and truly "Impostors" and making or attempting to make "Dupes" of the public. We borrow the words from the proceedings in one of the cases in England, referred to by the Defendants' Counsel. But we do not think that the present case is within those categories. It is sometimes difficult enough to draw the line between what is public and what is private; but in this case we think the Raffle could scarcely be called a public affair tho', doubtless, the prospectus was handed about by Boulanger's friends and agents, in places of public resort, and any one was readily admitted as a subscriber who paid his $10. Unlike the parties in the English cases quoted to us, Boulanger did not bring his Raffle before the

public, thro' the medium of the Press. He did not advertize it in the journals of the colony, and the drawing was not in public, but only in the presence of the subscribers, or those whom they had sent to represent them, on the occasion. But taking the case in the most favorable light here, for the Defendants, even if it had been a public, and let us assume in strict law, an unlawful affair, prohibited by the Colonial Code, while it might have been quite proper in the conductors of a public journal to point out the illegality and unfavorable consequences to Society from such an enterprise, the " Feuilleton " complained of does nothing of this kind. There is not one word said in the way of discharging the duty of the Press to keep the public right as to the illegality of lotteries and the duty of good citizens to abstain from joining them. All that is done is to insinuate pretty broadly that the affair, and particularly the drawing of the lottery, was not honorably and fairly gone about by Boulanger.

Now, unfortunately for the Defendants, these insinuations have been negatived, in fact they are found not to be true.

The Raffle was drawn regularly nine months before the publication of the paragraph complained of. There, consequently, were no " impostors" or " dupes " here. The case was not like the first of the English cases referred to, where the Jury gave nominal damages. We are willing to believe that the Defendant Laffitte, as he says himself, proceeded upon rumours, and the impressions no doubt of persons with whom he came in contact, and the fact, certainly a singular one, of the piano being still in the possession of Boulanger.

But we are of opinion that Laffitte did not make full and sufficient inquiries till after the paper was published and the mischief was done. Undoubtedly in the circumstances, he had considerable grounds for believing that the raffle had not been drawn, and he has this to say for himself, that he did not originate the rumours and reports. These are facts which may serve materially to mitigate and extenuate his fault; but before he printed and published such statement or insinuation, as we find in the article complained of, he ought to have taken those steps to inform himself accurately of the fact which he, himself, in his subsequent letter to the Editor of the paper, informs us, he adopted immediately after he had ascertained that the feuilleton produced a painful effect on the minds of many of his readers. Had this been done, the feuilleton would never have been published in the shape in which it appeared and nothing more would probably have been heard of the matter. But the Defendants have pleaded in the last place that if there was a libel, they have made a sufficient retractation or apology. On the other hand the Plaintiff, so far from accepting what the Defendants have offered as an apology, has stated that he considers it not an apology at all, but rather a repetition of the original offence.

It need scarcely be said that Defendants in an action of libel may always plead in mitigation of damages that he has made a retractation or apology. In some cases a Court of hold that the apology by itself amour a sufficient indemnity to the compla and nothing beyond nominal damag given: every case must depend upon cumstances.

It is unfortunate for the Defendant Laffitte, in his letter to the Editor of t *cial Gazette* of the 5th October 186 peated that he had proceeded upon rui he admits that he then knew that tho were false; for, he states that, on his per enquiries, they turned out to be The reference to what the *Sentinelle* a year previously, is also to be regrett an apology is found to be really one be simple and distinct, full and candi

It is true that the Plaintiff Bou ideas of what an apology in this case ou tain perhaps peculiar to himself, and s such as the Defendants could not a that was no bar to their making for th suitable and distinct retractation a when the facts had been cleared up tained. We cannot say that this wa the tone and temper of the defence t were certainly not apologetical.

It is to be noted that the Plaintiff] character in issue, and altho' his wi some of those called for the defence highly in his favor, he did not pass unscathed thro' the trying ordeal. S men of high standing in our comme stated that they were much dissatisfi conduct in certain trade dealings whi with him while he was a merchant, a made an arrangement with his credit

It was further shewn in evidence Plaintiff now employs himself as a p music, and holds a high place in tha and well paid class of teachers in o His income was estimated at £1200 No special pecuniary damage has be but that is not necessary in a case like where a grave question of character Witnesses of standing have said that cessary for the Plaintiff to bring the p ceedings to vindicate his character a self right with his friends and the p this opinion we think will be disput now that the whole matter has been tigated.

On the whole, for the reasons above after giving the case in all its circums bearings our best consideration, we th is one for damages but not for anythin high amount of damages which the P asked in his Declaration: we are of o the sum of £80 will be a suitable awar with costs, we now give Judgment for tiff, with caption of the body against fitte and Francis Channell, limited to

BAIL COURT.

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SOCIÉTE CIVILE,—POURSUITES EXERCÉES CONTRE LA SOCIÉTÉ,—APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT.

Lorsque le créancier d'une Société Civile exerce des poursuites contre celle-ci, il doit mettre en cause tous les membres de la Société, individuellement.

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CIVIL PARTNERSHIP, — JUDICIAL PROCEEDINGS ENTERED AGAINST THE PARTNERSHIP,—APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE.

Where the reditor of a Civil Partnership enter judicial proceedings against the latter, all the associates must be made parties as Defendants in the suit.

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H. B. HUGNIN, D. GALÉA & Co.,—Appellants,

versus

ARNASALON,—Respondent.

—

Before:

His Honor Sir C. F. SHAND, Chief Judge.

—

G. GUIBERT, —Of Counsel for Appellants.
F. ROBERT, —Appellants' Attorney.
L. CHASTELLIER,—Of Counsel for Respondent.
A. PITOT, —Respondent's Attorney.

—

2nd March 1869.

In the months of August and September last, the Plaintiff, in the Court below, Arnasalon, of Queen street, Port Louis, trader (now Respondent) sold vacoa or gunny bags for the price of £175 to P. A. Hugnin who subscribed the "Bons" or acknowledgement of the sale, as follows: "pour l'Etablissement *Belle Rive*, A. "D. Hugnin, D. Galéa & Co., A. P. Hugnin."

The price not being paid, the vendor Arnasalon raised the present suit before the District Magistrate of Port Louis, in which he called as Defendants H. B. Hugnin D. Galéa & Co.. Henriette Blancard, the wife of A. P. Huguin, and the latter for the authorization of his wife and the validity of the proceedings, and Dominique Galéa, landowner, as members of the firm H. B. Hugnin, D. Galéa & Co.

When the case came into Court it was contended by the Defendant's Counsel that the Plaintiff must submit to a nonsuit, inasmuch as the Plaint had not been entered against all the parties forming the partnership Hugnin Galéa & Co., and a deed of partnership, dated 24th October 1866, was produced by the parties called as Defendants, which established that besides themselves there were several other persons equally concerned in the Civil association in question for working the Sugar Estate *Belle Rive*.

The Plaintiff answered that the Defendants were not entitled to take advantage of their own wrong and refuse to pay the price of the articles sold, as they allowed A. P. Hugnin to subscribe the documents for them, and that the Plaintiff was not bound to find out who the members of the firm were, before raising his suit in payment.

The Judge in the District Court overruled the objection of the Defendants, and gave Judgment for the Plaintiff with costs.

The Defendants appealed.

G. GUIBERT argued for Appellants.

P. L. CHASTELLIER *contrà*.

THE COURT.

This is a question as to the proper course to be observed in bringing Defendants into a Court of Justice when they are sued as members of a *Civil* partnership. This is not a case of Commercial partnership, and therefore, with the forms to be observed in that class of cases, we have nothing to do in the present instance. It is to be particularly noted that when the Plaintiff dealt with Mr. Hugnin, he knew that he did not deal with the latter in his individual character or capacity, for the "Bons" granted by Hugnin were signed by him for a Civil society or partnership styled H. B. Hugnin D. Galéa & Co., and for the Establishment *Belle Rive*. This ought to have set the Plaintiff upon his enquiry as to who the partners of this Society actually were; with whom he had dealt, when he found it necessary to resort to a Court of Justice to recover the price of the articles sold by him.

The Plaintiff had chosen to take this Civil association for his debtors, as he was perfectly entitled to do; but he must take the consequences of his own act and be subject to the disadvantage arising, in certain eventualities, from not being aware of the names of all the parties with whom he had bargained, if he did not take the trouble, at the outset, of ascertaining who the persons really were to whom he sold his gunny Bags.

There is no reason to doubt that the names of all the persons would have been at once communicated to him, if he had asked for such information, as we find the Defendants, as soon as they were called upon in the Court below, produced their deed of Partnership.

The leading French authorities concur generally in maintaining that in case, like the present, of civil partnership, all the associates must be made parties, [S.41,1, 483—CARRÉ & CHAUVEAU 287 *bis*] as Defendants in the suit, and some of them are of opinion that this must be done under pain of nullity of the proceedings.

I do not find myself warranted, in the present instance, in going so far upon the texts of the law which they cite. This is not a case for a nonsuit; but I am of opinion that the present Appeal must be sustained, the Judgment of the District Magistrate set aside, and the case remitted back to him to make an Order that the partners not called be made parties to the suit and thereafter to proceed with the case as may be just. Costs reserved, with power to the District Magistrate to dispose of all questions of costs after deciding upon the merits.

SUPREME COURT.

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PREUVE TESTIMONIALE,—RES JUDICATA,—COMPAGNIE D'ASSURANCE CONTRE L'INCENDIE.

La déclaration de non-culpabilité, rendue par le Jury, sur une accusation d'incendie, et l'Ordonnance d'acquittement qui l'a suivie, ne s'oppose pas à ce que la Compagnie d'Assurance, actionnée en paiement du dommage, entreprenne de prouver par témoins les mêmes faits considérés comme constituant non plus un crime, mais un quasi-délit dans le sens de l'Art. 1382 *du Code Civil.*

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ORAL EVIDENCE,—RES JUDICATA,—FIRE INSURANCE COMPANY.

The verdict of not guilty returned by a Jury, upon a charge of Arson, cannot be invoked as res judicata preventing a Fire Insurance Company sued in payment of the damage, to adduce parole evidence in order to prove the same facts, no more as a crime but as a quasi delictus under Article 1382 *of the Civil Code.*

—

JOSEPH VIRAPA & WIFE,—Plaintiffs,

versus

THE MAURITIUS FIRE INSURANCE COMPANY,—Defendants.

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Before

The Honorable NICHOLAS GUSTAVE BESTEL, and
The Honorable GUSTAVE BARTHÉLÉMY COLIN.

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E. PELLEREAU, —Of Counsel for Plaintiffs,
J. MERCIER, —Plaintiffs' Attorney.
Hon. L. ARNAUD,—Of Counsel for Defendants.
J. PIGNÉGUY, —Defendant's Attorney.

—

17*th March* 1869.

On HON. L. ARNAUD's expressing his intention of adducing parole evidence in support of the facts set forth in the Defendants' Pleas.

E. PELLEREAU objected to any such parole evidence, the facts sought to be established having been negatived by the verdict of "not guilty" rendered in favor of Virapa the wife, the now Plaintiff, by the Jury empanelled for trying the charge preferred by the "Ministère Public" against Virapa the wife, the now Plaintiff, of having "aided and abetted" the parties charged by the same Criminal Information, with having criminally and wilfully set fire to the buildings insured by the Defendants.

It was contended that the verdict of "not guilty" was *Res Judicata* between the parties to this suit, and that the Court would not be warranted in allowing any proof tending to negative the verdict found in the Criminal Cou 1351 C. C. was quoted by Pellereau in of his objection.

ARNAUD denied the existence of any *R cata* between parties and the applicabi Art. 1351 C. C., to the matter before the

That there should be *Res Judicata*: 1o th demanded must be the same in the two 2o. the demand must be grounded on th cause of action; must be between the same and brought by and against the same pa *one* and *the same* capacity.

These requisites are not to be found i case.

The Defendants are no parties to the C Information, but the "Ministère Public," who is not the representative of the Defe except as Members of that community, th tection of which is entrusted by law officer.

The "Ministère Public" sues for t nishment of offenders.

But the Company, here, seeks to be r from the payment of a debt claimed by re a breach of contract on the part of Plaintif the Criminal Court, the Plaintiffs were c with having aided and abetted certain charged with having criminally and wilf fire to premises insured.

The verdict of "not guilty" negative charge, but, in this Court, the Defendan prove that Virapa the wife, not guilty it i of having aided and abetted the parties c with "arson," had, nevertheless, knowledge intention of setting fire to the buildings i for the purpose of defrauding the Compan that the buildings were burnt by her negli fault, and fraud.

On the Criminal side, she was charged w sin of commission.

On the Civil side with the sin of omissio is of not having prevented the setting fire t building insured.

On the Criminal side, punishment wa t of the "Ministère Public."

On the Civil side a release from a debt t a breach of contract on the part of Plaint sought after.

The two aims are different and may well together without any breach of the Article q Hence no *Res judicata*. Art. 1351 C. C. note 172. SIR : VIL : 42-2-467 and not authorities therein referred to.

For the reasons above, the Court ove Pellereau's objection and allows Arnaud to with the Examination of his witnesses.

The "arrêt" of cassation (Sir: V. 1867 1.108) in the case of *Roux* v. *Arnaud*, in no wise militates against the view the Court has taken of the objection of Pellereau; *Roux* v. *Arnaud* is an exception to the general doctrine recognized by the Cour de Cassation (See Note 1 & 2 p. 108) as shewn by the note (1) accompanying the case of *Roussin* v *Lecorre* (S. V. 1867 1.108): "S'il est vrai qu'en thèse générale le verdict négatif du Jury sur la question de culpabilité laisse subsister le *fait matériel* comme base possible d'une action civile en dommages intérêts de la part de la partie qui prétend avoir été lésée par ce fait matériel, il est autrement dans certaines circonstances exceptionnelles où le *fait* et *l'intention* de l'agent étant *indivisibles*, on ne saurait *isoler* le *fait* de la *volonté* qui l'a produit, sans remettre en question la chose irrévocablement jugée par le jury (CODE NAP: Art: 1351.1382,—CODE D'INSTRN. CRIMINELLE Art. 1382.)

(Rubrique de l'arrêt *Roux v Armand.*)

Cour de Cassation (chre. des reqtes.)

Audience du 22 juillet 1868.

Incendie.—Acquittement,—Chose jugée.—Responsabilité Civile.—Faute.

"La déclaration de non-culpabilité rendue par le Jury, notamment sur une accusation d'incendie, et l'ordonnance d'acquittement qui l'a suivie, ne s'opposent pas à ce que l'individu acquitté soit ultérieurement actionné devant la Juridiction Civile, et condamné à des dommages intérêts, à raison des mêmes faits considérés comme constituant non plus un *crime*, mais un *quasi délit* dans le sens de l'Art. 1382 du CODE NAPOLÉON,—Code d'Inst. Criminelle Arts. 358,359 et 366.—CODE NAP. Art. 1382. La condamnation civile est suffisamment motivée lorsque la décision qui la prononce constate que l'individu *acquitté* est *l'auteur* des faits dont l'Ordonnance d'acquittement a écarté la criminalité, et que ces faits constituent de sa part, une faute, sans qu'il soit besoin qu'elle précise les circonstances de nature à justifier cette condamnation.

Rejet en ce sens.

Nota.—Il est en effet bien constant que le criminel n'influe pas sur le civil lorsque le fait ou plutôt la *question posée* ne sont pas exactement les mêmes, et cette distinction est très importante pour les assureurs qui, au point de vue juridique, ont à examiner si en droit et en équité ils peuvent résister à l'exécution du contrat.

Voyez *Dictionnaire des Assurances et Table Décennale, Vo. Influence du Criminel sur le Civil* (Verbo-*Acquittement*) par Louis Poujet, Avt.

Voir *Journal des Assurances* par Poujet (Louis) 20e année.

Voir encore le *Dictionnaire des Assurances Terrestres* par Poujet (Louis) Vo. *Acquittement*, Vol. 1, p. 55 à p. 62. Ed. de 1855."

SUPREME COURT.

BAIL,—INCENDIE,—RESPONSABILITÉ DU LOCATAIRE.

LEASE,—FIRE,—RESPONSIBILITY OF THE TENANT.

WIDOW GIQUEL,—Plaintiff,

versus

PASCAL,—Defendant.

Before

His Honor SIR C. F. SHAND, Chief Judge, and
His Honor Mr JUSTICE BESTEL.

L. ROUILLARD, —Of Counsel for Plaintiff.
A. PISTON, —Plaintiff's Attorney,
E. DIDIER St. AMAND,—Of Counsel for Defendant
J. HALAIS, —Defendant's Attorney.

19*th March* 1869.

This was an action in which the owner of certain premises let to the Defendant, as a bake-house, at "Mesnil" in the District of Plaines Wilhems, sought to recover damages for the loss sustained, by the premises having been burned down.

The defence was that the Defendant was absent at the time of the fire, while the Plaintiffs were on the spot; that the fire occured from some "cas fortuit" or "force majeure" or, at all events, that it took place by no means through Defendant's negligence or fault.

L. ROUILLARD, for the Plaintiffs.—The Plaintiffs let the subjects now burned down to the Defendant, by a writing under private signatures, dated 28th January 1868. They consisted of a bake-house and stone fire place, &c. The rent was $15 per month, and the duration of the lease one year from 10th February 1868. The premises perished by fire on the 22nd December last, and under Art. 1733 of the CIVIL CODE, the tenant must make good the loss, unless he proves that the fire took place by a "cas fortuit," by a *vis major* or "vice de construction."

E. DIDIER, *contrà*.—It is enough if I show that my client was not in fault: When the Theatre *La Gaité* was burned down in Paris, all that the tenant was held bound to establish, to save his liability for the damage, was that he had observed all the Police regulations for the prevention of fire in such establishments. TROPLONG No. 388 and seq. § 37, 2-70.

A number of witnesses were examined on both sides.

THE COURT.

In cases of this description the law is very clearly traced out by Art. 1733 of the Civil Code, in the following terms : "Il (le preneur) répond de l'incendie, à moins qu'il ne prouve, que l'incendie est arrivé par cas fortuit ou force majeure, ou par vice de construction, ou que le feu a été communiqué par une maison voisine."

The burden of establishing what the origin of the fire really was is thrown upon the tenant who, being in possession of the subjects, must, *prima facie*, at least, have far better means for establishing the truth and is, far more likely, by the fault of himself or those on the spot, with whom he is connected, to have caused the loss than the landlord, who may leave at a distance from the place. Now, in the present case, we do not think that the Defendant has been able to shew (prouver) that the fire arose in any of the special circumstances pointed out in the article. Even were we to hold that the origin of the fire was a "mystery," to use the words of one of the Defendant's own witnesses, a Sergeant of Police, that would not, we think, save the responsibility of the Defendant, as it would not bring the case within any of the specific categories set forth in the article. But there is a good deal of evidence to shew that the Defendant,and those in his employment, were not careful in the way they dealt with the live embers when the oven was extinguished after the daily batch of bread had been fired.

It appears that portions of those embers were often allowed to lie about on the floor of the bake-house, in which, tho' at a considerable distance (9 or 10 feet), there was a pile of wood kept for the service of the oven, and that the embers were occasionally used by the Defendant's for cooking their meals in a corner of the bake-house, and we are not satisfied, looking at the whole evidence, that this carelessness had not actually taken place on the day of the fire.

The Defendant's Counsel has plausibly argued upon the Decision, in the French Courts, of the case of the burning of the Theatre "*La Gaîté*," in Paris, in February 1835. He has submitted, upon the strength of that Decision, that when a person takes a lease of a Theatre or a Bake-house, or any building which, from its very nature and the purposes to which it is applied, is more exposed to danger from fire than ordinary houses, all that he has to do to exempt himself from liability, in case of a fire, is to shew that he had used all possible precautions to protect the premises from the risk of conflagration. We think that this is a fair enough statement of the Decision in the French Courts referred to.—S. 32 2.70, of which both TROPLONG No. 588 and DUVERGIER Vol. 1 No. 417 disapprove. But this case is not at all a similar one; for,as we have already stated, there is but too much evidence to shew that the Defendant and his men were not at all careful in regard to fire within the buildings. We are, therefore, of opinion that the Plaintiffs have so far made out their case.

As to the value of the premises we are satisfied that the Plaintiffs' demand attempted sustained by their witnesses, is far too We have no doubt that the estimate giv the witnesses for the defence is much nea truth. It is farther to be noticed that wh fire took place, there was but little done by-standers, to save the property. The dant was, unfortunately, not at home; could do nothing to protect his interest the conduct of, at least, one of the Plainti not becoming as, apparently from not liki Defendant as a tenant, she looked on an templated the progress of the fire with complacency instead of doing what she c save the property.

There is, therefore, no reason why the tiffs should not be strictly held to the va the premises as spoken to by the most r witnesses.

On the whole we are satisfied, that wh allow the sum of £30 for rebuilding th mises, with the rent of £15 per month months of lost time or £9, together £3 give what is a fair and equitable compe to the Plaintiffs for the loss sustained by

Judgment is, therefore, given for the s £39 with caption of the Defendant's pers mited to 3 years. Costs to Plaintiffs, bu at the rate of the District Courts.

BAIL COURT.

APPEL D'UN JUGEMENT DE MAGISTRAT S DIAIRE,—PROCÉDURE SUR APPEL.

La partie faisant appel d'un Jugement de Ma Stipendiaire, n'ayant pas notifié son Act pel à l'Intimé, aux termes de l'Art. 19 *de* 15 *de* 1852, *l'Appel a été rejeté avec dépe*

APPEAL FROM A JUDGMENT OF STIPENDIAI GISTRATE,—PROCEEDINGS ON APPEAL.

Where the Appellant had not given the privi pondent notice of the Appeal, in terms of of Ord. No. 15 *of* 1852, *the Appeal was di with costs.* (*See Teeluck* v *Trébuchet, Vol. VI, Page* 58.)

INGUY,—Appellant,

versus

MINISTÈRE PUBLIC,—Respond

Before :

His Honor Sir C. F. SHAND, Chief J

W. NEWTON, —Of Counsel for Ap
A. DE COMMARMOND,—Appellant's Atto
E. J. LECLÉZIO, Substitute Procureur appearing for the Crown.

2nd March 1869.

This was an Appeal from a Judgment of the Stipendiary Magistrate of Port Louis, by which he had condemned the Appellant to pay to the parties who sued him in the Court below, certain sums of wages which they alleged were due to them for work and labor done in his employment as a manufacturer of Cigars.

When the case was called in this Court, it was objected *in limine*, by E. Léclézio *Junior*, as SUB. PROC. GENERAL, that the Appellant had failed to give notice of his Appeal to the Respondent, as required by § 19 of Ord: 15 of 1852, and that, therefore, his appeal should be dismissed.

The Ordinance enacts that when an Appeal is to be made in such a case as the present, to the Supreme Court, notice shall be given to the Stipendiary Magistrate who shall immediately bind the party giving notice, by recognizance with sufficient security, to prosecute his Appeal; and it is further ordered that the party having been so bound by recognizance, shall lodge his Appeal in the Registry of the Supreme Court, and give to the Respondent notice of the said Appeal, within 3 days from the date of the recognizance.

The Ordinance further enacts that: "Every "Stipendiary Magistrate, upon receiving a notice "of Appeal and accepting a recognizance, shall, "forthwith, transmit to the Registrar of the "Supreme Court, duly certified copies of the "Original of the sentence or Order appealed "against, and of the whole of the evidence given "on the hearing of the complaint to which it "refers."

XXI.—"On such Appeal being entered in "the Registry of the said Court, and on the "aforesaid proceedings being thereto transmit-"ted, notice thereof shall be given, by the Re-"gistrar, to the *Procureur General*, and without "any summons or order to that effect; the cause "if the Respondent be a laborer and not appear-"ing by Counsel, shall *ex officio* be set down for "hearing between the Ministère Public and the "Appellant, at the first sitting of the Supreme "Court which may take place not later than "three days after the Registrar's receiving the "aforesaid proceeding, and such appeal shall "have a continued priority of audience before "all other causes, until finally decided."

Upon these sections of the Ordinance, the Counsel for the Crown contended that the appeal was badly brought; for, if the Respondents get no notice of the appeal, how could they select Counsel for themselves, which, of course, it was their right and privilege to do.

W. NEWTON, *contra*. The want of notice is not an absolute but a relative nullity. The whole object and purpose of the law has been gained here, for we have, in point of fact, the cause set down by the Registrar, and the learned Sub. Proc. General actually present to argue the case.

THE COURT.

The objection taken by the Crown is fatal to this appeal. In all cases, the party against whom the appeal to a higher Court is entered must receive notice of the appeal, otherwise he would be kept entirely in the dark and in the ignorance of the proceedings taken against him, and he would not be able to appear in the higher Court and support the Judgment which he had obtained in the Court, below.

Under the special provisions of this law, the necessity of giving proper notice to the Respondent in the Appeal, is in one point of view, if possible, stronger than in the ordinary case; for how is he to have the option, if he chooses, to appear at the hearing of the appeal by his own Counsel, if he does not even know of the existence of the Appeal, having got no notice that his opponent has submitted the case to the review of the higher Court?

Appeal dismissed, with costs.

SUPREME COURT.

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TUTELLE,—REDDITION DE COMPTES, — SUCCESSION,—BÉNÉFICE D'INVENTAIRE,—COMPENSATION,—ART. 802, C. C.

L'héritier sous bénéfice d'inventaire n'est tenu du paiement des dettes de la succession que jusqu'à concurrence de la valeur des biens qu'il a recueillis. Ses biens personnels ne se confondent point avec ceux de la succession.

—

GUARDIANSHIP, — ACCOUNTS, — SUCCESSION, — BENEFIT OF INVENTORY, — COMPENSATION,— ART. 802, C. C.

The heir under benefit of inventory is bound to pay the debts of the succession, but only up to the value of the property he has collected. His own property is not mixed up with that of the succession.

—

GEORGE RANKIN,—Appellant,

versus

A. CHEVALIER,—Respondent.

—

Before:

His Honor Sir C. F. SHAND, Chief Judge, and His Honor Mr. JUSTICE BESTEL.

—

G. GUIBERT,—Of Counsel for Appellant.
J. GUIBERT,—Appellant's Attorney.
V. NAZ, —Of Counsel for Respondent.
E. DUCRAY, —Respondent's Attorney.

—

18th March 1869.

The Respondent as guardian of the minors George Rankin, (the now Appellant) and James Rankin, had to account for the administration

he had had of their persons and property, from the 17th June 1862 to the 20th May 1866, when he was relieved from his guardianship by the emancipation of the said George Rankin (the Appellant) and by the appointment of a new guardian to the said James Rankin.

This account the Respondent has rendered; but objections were taken to it by the Appellant who now complains of the ruling of the Master on his several objections.

It is admitted, says the Master, that during his guardianship, the Respondent Chevalier had received the rent of a shop existing on an immoveable property situate in Arsenal and Farquhar streets, Port Louis, belonging for 3/4 to Joseph Rankin and the minors aforesaid, and for 1/4th to the minors Thomas, the issue of the 2nd marriage of their mother to one Benjamin Thomas

Previous to the beginning of the Respondant's guardianship, and by a notarial deed of the 13th May 1861, the now Respondent Chevalier had sold to the mother of the said minors Rankin, then the wife of the said Benjamin Thomas, a plot of ground situate at 'Roche Bois,' for and in consideration of a sum of $ 1,000; for the payment of which sum, the said Thomas and wife, by the same deed, abandoned to the Respondent Chevalier, the exclusive enjoyment for fifty seven months to run from the 1st June 1861, of the shop aforesaid, then occupied by a Chinaman, to whom, as stated in the deed by the said Thomas and wife, it was let for $20 a month.

It must be borne in mind that the widow Rankin, previous to her second marriage with Thomas, had neglected to assemble a family Council to decide whether she should preserve the guardianship of her children.

By such neglect she necessarily lost the guardianship (Art. 396 C. C.), and by the fact of her second marriage she lost the legal "usufruit" of the property of her minor children (Art. 386 C. C.), and the consequence was that she was without right and authority to dispose of the ½ then belonging to her children, in the enjoyment of the shop aforesaid. Yet, says the Master, the agreement as to the abandonment of the shop for the lapse of time above mentioned, is binding on the minors Rankin, on George Rankin, as one of them, in as much, continues the Master, as they were held towards Aristide Chevalier, by the exception of guarantee as heir of their mother "*Quem de evictione tenet actio, eumdem agentem repellit exceptio.*"

The application of that Rule to this cause is one of the objections urged against the Master's Decision.

We shall, therefore, proceed to ascertain the soundness in law of the Appellant's objection.

On the death of their father Rankin, the appellant George Rankin was in a state of minority.

The succession could not be accepted by his mother as his guardian, but under benefit of inventory. George Rankin was, neverthel of the heirs of his father and as such ent his share in the shop above mentioned, part of his father's succession.

The share became his personal propert distinct from the assets of his mother's suc

Whilst it is admitted by the Master, reasons by him stated, that the mother right nor authority to dispose of the half ing to her minor children, yet in the M opinion as heir of his mother he was bo guarantee Chevalier from the damage whi annullation of the Contract between Ch and their late mother might entail on Ch But the Appellant was still a minor at the of his mother, and could not become he but under benefit of inventory (Art. 776 as such not answerable for the liabilities mother, except to the extent of the assets estate left by her (Art. 802 C. C.) The of inventory is attended with the twofo vantage 1o. of preventing any confusion b the heirs private property and the assets succession, and 2o. of preserving the rig the part of the heir, of asserting any p claim he may have against the succession 802 §2 C. C.)

No doubt an heir, though under ben inventory, is an heir in the eyes of th but not to the same extent as an heir " simple," but to the extent clearly defined law (Art. 802 C. C.), and no further.

The Decision of the Master does awa the distinction clearly established by t between the liabilities of an heir with of inventory and those of an heir "pur e ple."

In support of the opinion expressed Master, it was said that it never was c plated by the Respondent, nor by the that the Appellant should be deprived of th putable advantage accorded by the law to t pellant as an heir under benefit of inv When it shall have been ascertained th assets of the mother's succession are cient to meet the liabilities of the decease only, will the time have arrived for the hei benefit of inventory to insist upon the exe the privileges enacted in his favor.

Up to that moment, his objection to t ling of the Master is premature. There v possible chance of his being made answera the liabilities of his deceased mother, beyo amount of the Assets of her succession. T of the law is too precise to admit of a c construction. Were he compelled, at to indemnify the Respondent, we would, i of insufficiency of Assets in the succession deceased, have to recover from the Resp any amount he might have paid him ov above such assets.

JUDGMENT.

But why should the Appellant be held temporarily, to indemnify the Respondent

any loss upon a contract which the Master admits to be illegal, but binding upon the Appellant, on the sole ground that he is an heir of his mother. Such a reasoning would be good, were the Appellant an heir "pur et simple" of his mother, instead of his being an heir *under benefit of inventory*.

Were he to guarantee the Respondent, in case of insufficiency of assets in the succession, he would have to bring against the Respondent, an Action for the refunding of the amount paid by him.

His action, when brought, might be directed against one who might be insolvent at the time of the action. So he would be a looser contrarily to the spirit and letter of the law (Art. 802). See CHABOT on *Successions*, Art. 802, Vol. 3, Page 7, 1o. & 2o.—TOULLIER, Vol. 4, No. 357 —GILBERT, note 17 on Art. 802 C. C.

The Appellant, an heir under benefit of inventory, not being bound to indemnify the Respondent from any loss arising from the illegal contract between his late mother and Respondent, we are of opinion that the rule of law cited by the Master, in overruling the objection of the Appellant, has been misapplied, and we shall and do therefore abstain from affirming this part of his Decision.

The second ground of objection to the Master's Decision was that the Respondent had not accounted, to the Appellant, for one-fourth of the rents received by him from the tenants of the real property in Arsenal street, from the day of his appointment as guardian, that is to say since the 17th June 1862 to the 29th May 1866, when his guardianship ceased, which said rent amounted to the monthly sum of $60.

It appears to us a necessary consequence of the nullity, as to the Appellant, of the contract between the now deceased mother of the Appellant and the Respondent, that Chevalier's account ought to embrace that portion of rent of the shop and pavillon in Arsenal and Farquhar streets, accruing to the Appellant, from the day of his appointment as guardian, that is from 17th June 1862 to the end of his guardianship on 29th May 1866.

The Master, holding the contract above referred to be binding upon the Appellant, has allowed the guardian to retain the rent of $20 for the house, in payment of the purchase price of the premises at "Rochebois," and only charged him with a rent of $50 a month from the cessation of his guardianship up to the date of his giving in his account.

In our opinion the Appellant ought to be credited for his share in the rent of the shop in Farquhar street, from the 17th June 1862 to the 29th May 1866, and also in the 3 months' rent at the rate of $50 as stated by the Master.

The Appellant ought, moreover, to be credited with his share in the rent of the pavillon in Farquhar street at the rate of $10 for 13 months, plus for his share in the rent of the same pavillon at $15 for 4 months.

But what might be the amount of the rent be for which the appellant is to be credited from the 17th June 1862 to the 29th May 1866? If after paying himself the debt due to him by the Appellant's mother, he succeeded in obtaining a rent of $50 for the shop, in 1867 or 1868, when rent was much reduced, *à fortiori* might be have obtained, if not a higher, at least an equal amount of rent when rent was higher that it was in 1867 or 1868. We shall, therefore, amend this part of the Master's Report by assessing to the Appellant his share in a rent of $50 per month, from the 17th June 1862 to 29th May 1866.

We shall abstain from disturbing that part of the Master's Decision refusing parole evidence in proof of the Appellant having been employed by the Respondent for the purpose of rebutting the claim preferred for the maintenance of the Appellant for several years. The sum claimed is any thing but unreasonable, and it is very doubtful that the Appellant could claim from the Respondent an amount sufficiently high to be set off against the sum claimed from him for boarding, lodging, clothing and schooling.

Upon the whole we shall and do allow the Appeal. We hereby reverse that part of the Master's Decision which holds the Appellant bound by the contract entered into by his mother with the Respondent with regard to the shop in Arsenal and Farquhar streets. We amend that part of the Master's report having reference to the amount of the rent which, we find, ought to run from the 17th June 1862 to the 28th March 1868, and to be an average rent of $50 per month.

As to costs, we shall give ¾ds to the Appellant, as taxed by the Master.

SUPREME COURT.

ACTION EN REVENDICATION D'UN TERRAIN,—QUESTION DE FAIT RÉSULTANT DE TITRES.

ACTION IN VINDICATION OF A PLOT OF GROUND,—QUESTION OF BOUNDARIES RESULTING FROM TITLE DEEDS.

LEBLANC,—Plaintiff,

versus

NANINE, — Defendant.

Before:

His Honor SIR C. F. SHAND, Chief Judge and His Honor Mr. JUSTICE BESTEL.

L. CHASTELLIER, —Of Counsel for Plaintiff.
A. J. COLIN, —Plaintiff's Attorney.
HON. L. ARNAUD,—Of Counsel for Defendant.
J. PIGNÉGUY, —Defendant's Attorney.

19th March 1869.

In this case the facts and the Pleas of parties are fully stated in the Judgment of the Court.

CHIEF JUSTICE: This was a dispute regarding a piece of ground of about 2 acres in extent, at the "Quartier Militaire," in the district of Moka. The Plaintiff asked that the land should be declared to belong to him; that he should be put in possession of the same, and that the Defendant should be condemned to pay $500 damages for trespass and illegal possession.

The property of the land in question was claimed by the Plaintiff, on the allegation that he bought it from one Pierre Jean L'Endormie, in terms of a deed drawn up by Mr. Notary Maingard, on the 29th April 1865; that he, the said L'Endormie, purchased it from one Auguste Nicolas Pugin who, in his turn, had acquired it from Madame Louis de Chasteignier Paradis, the widow by her first marriage of Jean Avice, and by her second, of Louis Besseignet, according to a deed of sale of 4th December 1840.

According to the Plaintiff's averments, the piece of ground in question was bounded as follows:

"On one side by the Jacquard River; and on the three other sides by Auguste Nicolas Pugin or his assigns, that is to say, on one of those three sides by Azor, alias Azor Lahache, holding the rights of the said Pugin; on the second side by Georges Manuel, holding the rights of the said Pugin, from which it is separated by a "ballisage" called "Allée Besseignet;" and on the last side by Marie Nanine (the Defendant) the alleged assignee of the rights of Victor Bazire the wife, who held the rights of the said Pugin, as the said boundaries appear, and are fully described in a Plan made by Sworn land Surveyor L. Hily, under date of the 9th March 1866.

It appeared that when Hily went upon the ground, after having given due notice to the Defendant, and the neighbouring properties, his survey was opposed by the Defendant, who stated that she had been in possession of the land for more than one year, in virtue of the sale to her by Bretagne & Co. and a survey by Mr. Frogerays, Sworn land Surveyor. But Mr. Hily continued his survey at the risk and peril of the Plaintiff and set off his plan of the two acres in the following manner: "J'ai mesuré le long d'un ballisage de 12 pieds limitrophes avec Madame veuve George Manuel, la largeur de vingt perches."

"Madame veuve Manuel m'a communiqué son titre qui est une vente par M. Latour à M. G. Manuel, suivant acte de M. Vigoureux de K[Morvant Notaire, en date de 8 Mars 1860, lequel contrat donne pour voisin limitrophe le sieur Pierre Jean. Cette partie que j'ai mesurée forme la limite Sud-Est du terrain de M. Leblanc. J'ai mesuré au Sud-Ouest la longueur de dix perches, à angle droit; cette limite Sud-Ouest est limitrophe avec le terrain de Demoiselle Marie Nanine; au Nord-Est encore par Demoiselle Marie Nanine, sur dix-neuf perches; au Est par les sinuosités de la rivière Jacqu superficie est de deux arpents; aux ang les bornes indiquées au dit plan, que planter; tel que tout sera indiqué au pla

On the other hand the Defendant Nan eged that the ground in question was h perty, forming, as she averred, a porti plot of ground of 5 acres which she h chased from the firm of Bretagne & Co., 19th June 1865, by deed drawn up by Mr. Raoul. The boundaries of the land pu by her, she set forth as follows: On the West by Miss Clara or assigns, on of 20 perches and five feet; on th West by Miss Augustine Pétronille, on eight perches; on the South-West by the Besseignet, on twenty four perches and feet; and on the North-West by the rig of the River Jacquard and the property Lahache; all as shewn in a plan drawn Anthony Frogerays, Sworn Land Surve the 17th November 1863.

In that plan Frogerays, who had beer in by Bretagne, on occasion of his pur the ground from Henry Drenning, August 1863, laid down the whole groun consisted of six plots forming altogethe perficies of 26 acres and 40 perches, by into one block such of the plots as lay con and measuring them as if they formed o piece of ground. He said that he had work in this way to "facilitate" his sur had laid off upon the ground 3 portions from each other, of which the first porti prising 5 acres and embracing the 2 dispute, was thus described by him:—

"*La première portion* composée de 1
"et de 4 arpents provenant de Dame
"Bazire, formant un total de 5 arpents.

Abornements de la première portion:

"*Bornée vers le Nord-Ouest*: Par De
"Clara ou ayant droit, sur une longu
"vingt perches et cinq pieds."

"*Vers le Sud-Ouest*: Par Demoiselle
"tine Pétronille, sur vingt huit perches.

"*Vers le Sud-Est*: Par l'allée Bessaig
"vingt quatre perches et douze pieds;
"*Nord-Est*: En partie par la rive droite
"Rivière Jacquard et le terrain de Azor
"che, ainsi qu'il est expliqué au plan ci-j
"quel est désigné sous le titre de *Premiè*
"*tion*. Des bornes à la marque B. pour
"gne ont été placées aux endroits indiqu
"le dit Plan."

"La superficie du terrain, sans compre
"berge de la rivière en est, en droit Est,
"il est indiqué au titre de cinq arpents."

The Defendant denied the alleged trespa ting that she always kept herself within h ful boundaries. It was admitted on bot that their common author from whom all tles flowed, was the said Auguste Nicol

formerly owner of the ground in question, with other land at the same place.

The Plaintiff farther traced his alleged right to the land in dispute, in virtue of older title-deeds of the following tenor: 1st: A sale by the said Pugin to Pierre Jean L'Endormie, dated 15th August 1853, of two plots of ground, the one of 4 acres in extent, the other of 2. The Plaintiff averred that the latter plot was the one in question in the present suit. The description of this plot so sold by Pugin to l'Endormie, was as follows: "la seconde portion de deux arpents, d'un côté par la rivière Jacquard, et trois autres côtés par le vendeur." In the same deed it was stated: " Et la seconde portion de deux arpents pour l'avoir acquise (by Pugin) aussi en plus grande étendue, de Madame Louise de Chasteignet Paradis, épouse divorcée de M. Jean Avice et veuve en seconde noces de Monsieur Louis Besseignet, suivant contrat passé devant Monsieur Liénard, l'un des notaires soussignés et son collègue, le 4 Décembre 1840." On 29th April 1866, L'Endormie went before Mr Notary Maingard and sold to Plaintiff those 2 plots of ground with the same boundaries; word for word.

It was farther shewn that Pugin, on 25th November 1857, had given a *donatio inter vivos* to Nicolas Latour, of a " portion de terrain de forme triangulaire située au dit quartier de Moka, (Quartier Militaire) et borné; d'un côté par Pierre Jean; d'un autre par la rivière Jacquard et du troisième côté par la route de Flacq. Pugin had acquired this land, along with a larger portion, from Mr Jean Baptiste Rivière, on 5th May 1842. La Tour, on 8th March 1860, sold this piece of ground to George Manuel and a survey was produced, verified upon oath of Felix Target, Sworn land measurer, dated 4th June 1860, setting off the said piece of land in terms of the description in these deeds, with the substitution of " M. Raynal aux droits de Pierre Jean."

The Plaintiff contended, on this survey, that as the lands of Pierre Jean are here stated to be a boundary, in point of fact, on the side of the " Allée Besseignet," and as the lands of Pierre Jean had originally belonged to Pugin, he (the Plaintiff) had identified the subjects claimed in this case, as quite answering the description given in the deeds in his favor.

So much for the deeds founded on by the Plaintiff.

Let us now see how the Defendant completed her claim of titles.

She rested her claim to the piece of ground in question, on the following additional writings, viz: a deed of sale by Pugin to Gony, of date 13th October 1846, of two plots of ground; the 1st of 4 acres with the following boundaries: 1o. Fortuné Cazouba; 2o. Victor Bazire and Azor la Hache; 3o. la Grande Allée; 4o. Paul Victor. The 2nd of 3 acres with the following boundaries: 1o. Mr. Lerare; 2o. Léonide Denis; 3o. Nicolin La Tour; 4o. Mr. Beaulieu. On a 2nd deed of sale by Pugin to Fourgean, dated 16th May 1847, of 3 acres derived from Rivière, bounded: 1o. by the river Jacquard; 2nd by the high road to Flacq; 3rd side by *Madame* Pierre Jean; and the 4th side by the " Grande Allée." On a third deed dated 4th May 1859, by which Bazire and wife (veuve Gony) sold to Drenning 3 plots; the 1st of one acre, bouded: 1o. by the Rivière Jacquard; 2o. by Marie Claire; 3o. by the venderesse alors veuve Joson Gony, and 4o. by Azor La Hache; the 2nd of 4 acres bounded by: 1o. Fortuné Cazouba; 2o. Victor Bazire and La Hache; 3o. Grande Allée; 4o. Paul Victor. The 3rd of 3 acres bounded by: 1o. Lerare; 2o. Léonide Denis; 3o. Nicolin La Tour; and 4o. Mr. Beaulieu. On a fourth deed dated December 1863, by which Drenning and wife sold to Bretagne a variety of plots of ground and among others those just described; and on a 5th deed dated 19th June 1865, whereby Bretagne & Co. conveyed to Defendant a plot of 5 acres bounded, by N. W., Clara "ou ayant droits" 5 perches and 5 feet. S. E. Demoiselle Pétronille, sur 28 perches. S.E. Allée Bessaignet 24 perches et 12 pieds. N. E. par la rive droite de la rivière Jacquard and Azor La Hache, all as shewn in Frogeray's Plan of 17th December 1863. In determining the legal rights of parties in this suit, it is necessary to bear clearly in mind what their position really is, and what is the precise nature of the demand of the Plaintiff.

The Plaintiff say that a certain plot of ground of 2 acres belongs to him, although it is in the possession of the Defendant. It lies admittedly in the angle formed by the river Jacquard and a road of 12 or 14 feet broad, called in the Titles, sometimes the " grande allée," and more frequently the Allée Besseignet" touching that River at nearly a right angle. Now two things are to be remarked here, first, that the Plaintiff must establish his right to this indentical plot of land so lying and situated, and secondly, as the Defendant is confessedly in the occupancy of the ground, the Plaintiff must shew a right to the property, so clear, that we shall find ourselves warranted in disturbing the possession of the Defendant in ejecting her and putting the Plaintiff in her place.

Prima facia, at least, with 2 such palpable and distinct boundaries as those just mentioned, one would suppose that a person claiming the property could easily shew it by a glance at his titles. But this is not the case with the Plaintiff.

In his deed of sale from Pierre Jean L'Endormie, he has only one definite boundary, viz: the River, while the others are said to be generally, lands belonging to Pugin or those in his rights. Now, as Pugin was originally the proprietor of all the ground in the neighbourhood, and from time to time disposed of his property in lots, or, as we commonly say, morcelled out his ground, this, necessarily comes to be, in the circumstances actually existing, a very general and vague description. But it will not escape attention that even the one boundary stated, viz: the river, is by itself and without some other definite mark, a very wide designation for standing alone, we cannot say what particular part of the river, in all its length, it may be of many miles, is actually referred to. Pressed by the vagueness of his original title and necessarily obliged to be more specific, the Plaintiff has averred that the other boundaries besides the river of the plot in question, are actually on one

side the land of Azor La Hache, holding the rights of the said Pugin; on the 2nd side the lands of George Manuel, also holding the rights of Pugin, from which it is separated by a "ballisage" called the "allée Besseignet," and on the last side by the lands of the Defendant Nanine, also holding the rights of Pugin. Now, unfortunately for the description, the land of Azor La Hache did not belong to Pugin at the date of the deed by him to L'Endormie (1853). It had been given off before that date. As to the boundary of the lands of George Manuel, which lie on the opposite side of the "allée Besseignet" those lands, at the date of L'Endormie's deed, belonged to Pugin, and he says in his donation of them to La Tour (25th November 1857) that they are bounded; on one side by Pierre Jean; the other by the River Jacquard and the 3rd by the high road to Flacq. It is very remarkable that the boundary of the "Allée Besseignet" was not given, if the lands really reached to that road. We should certainly have accepted that so visible and palpable a boundary would have been set down, and not omitted altogether in the description. Had this, the real actual boundary, on this side, according to the Plaintiff's contention, been given to his plot of ground, his argument would have been much simplified, but the want of it adds considerably to the doubt and difficulty of his case, more particularly as we find in the titles of other portions of Pugin's ground, this very alley given as a boundary. See, for example, Sale Pugin to Gony, 13th October 1860. By that last deed it is shewn that the "Allée Besseignet" was one of the boundaries of part of the lands conveyed to Gony (in whose shoes, so far as her interest extends, we have seen the Defendant now is.) How could the Plaintiff's right extend to that "allée" at the place in question, by a deed granted seven years subsequently? Besides, in some of the deeds, we have both this alley, and the lands of Pierre Jean given as a boundary. It is plain that they did not and could not mean the same thing as the Plaintiff is obliged to argue.

It is to be farther noticed that in the above deed (Pugin to La Tour, 25th November 1857) the extent in acres is not given. This introduces another element of uncertainty and confusion, in dealing with subsequent titles and the rights of after-acquirers.

Passing from the titles of the Plaintiff, which are of necessity the most important evidence in such a case as the present, to the titles of the Defendant, we have carefully examined those latter documents and altho' they have been freely criticised by the Plaintiff who has naturally dwelt much on the absence of any clear and positive mention of the river as a boundary of the locality in dispute, we think that they are exposed to less objection than those of the Plaintiff. The Plaintiff, it will be remarked, not only admits the Defendant to be a proprietor on the spot, but he accepts her as his next neighbour on two sides. He comes to disturb her in her possession. She and those from whom she derives her title have been in the occupancy of the land in dispute, for many years. In a case of this description it need scarcely be said that the Defendant does not require to rely on the strength of his own case if he can establish the weakness of the Plaintiff. It is enough for a Defendant and for a party i session, to say that the Plaintiff, his opponei not proved his case against him, and that fore the Court must allow things to rem they are.

We have not overlooked the depositions witnesses in the case and the plans of the veyor, but those parts of the evidence tal they must be, with reference to the actua deeds of the parties, do not, in our opinion, rially assist the Plaintiff, but rather on the we think, tend to confirm the position of th fendant.

In the circumstances above detailed we opinion that the Plaintiff has not establish case in evidence, and therefore (Plaintiff s ting) a nonsuit will be entered.

BAIL COURT.

CONCORDAT,—INTÉRÊTS,—IMPUTATION DE MENTS,—DEMANDE EN RÉSILIATION DU CORDAT.

ARRANGEMENT,— INTERESTS, — APPROPRI OF PAYMENTS,—MOTION FOR THE CAN TION OF THE ARRANGEMENT.

TENNANT,—Plaintiff,

versus

BOULANGER,—Defendant.

Before:

His Honor SIR CHARLES FARQUHAR SI

HON. V. NAZ, —Of Counsel for Plaintiff.
H. BERTIN, —Plaintiff's Attorney.
L. ROUILLARD,—Of Counsel for Defendan
G. A. RITTER,—Defendant's Attorney.

25*th March* 1

On the 1st of last month, the Court, application of Mr Bertin, Attorney on beh Frédéric Tennant, of Port Louis, Broker, g a Rule to shew cause why the arrangeme tween Aristide Boulanger, formerly Merch Port Louis, and his Creditors, filed and con by the Court, on 20th October 1862, shou be annulled "inasmuch as it has not been ted between parties."

By the said arrangement, Boulanger und to pay 40 per cent on his debts, amountin gether to $112,829.66c. by three equal ments: on 1st September 1863, on 1st tember 1864, and on 1st September 186 pectively "without paying any interest said 40 per cent."

The Rule was made returnable for the following Monday. Tennant filed two affidavits stating that he was creditor of Boulanger to the amount of $984.02c, and that the arrangement has not been executed.

The said sum of $984.02c. was made up as follows: A Promissory Note for $400.39c. subscribed by Boulanger, on 3rd June 1862, which appeared as a debt due by him in his Balance-Sheet; 2ndly, a "Bon" for $150 subscribed by Boulanger, on 15th June 1862, which did not figure in his Balance-Sheet; 3rdly, interest on the said two sums at 12 o/o to 1st February 1869, $433.64c., making altogether the above sum of $984.02c.

Boulanger having obtained an Order from the Court, to examine witnesses to shew that money had been paid by him to Tennant, the latter on 8th February last, put in a supplementary affidavit bearing that it was by error he had included in his first affidavit the sum of $150 plus the interest due thereon. That the said sum of $150 was the amount of one and a half month's salary due to him by Boulanger at the time of his Petition to the Court, for an arrangement, and being a privileged debt which could not be affected by the intended arrangement, it was not in fact comprised by Boulanger, in his Balance sheet. That a sum of $145 had been paid to him by Boulanger thro' a Mr. Raffray, which Tennant acknowledged as in part payment of his said claim of $150, principal and interest.

The case was argued by HON. V. NAZ for Tennant and L. ROUILLARD for Boulanger. None of the other creditors joined in the application of Tennant. They were all desirous of maintaining the arrangement.

THE COURT.

HON. NAZ, the Counsel for the party asking that this arrangement be set aside, has argued that the "Bon" for $150 is a good and valid document of debt against Boulanger and available notwithstanding the arrangement, in which, altho' it was then existing, it was not noticed and included.

It has been contended that the debt was a privileged one, being for the salary of a clerk; and it has been assimilated, in argument, to a debt secured by mortgage, which will not be affected by an arrangement with the general body of creditors. The Court gives no Judgment on the point of the validity of the "Bon" in question, but it must not be held to concur in the view of the case presented by Mr. Tennant's Counsel.

It is thought that a debt secured by mortgage may be said to be in a very different position. It is known or may be known to the whole body of the creditors. It is inscribed in public Registers accessible to all the persons having an interest in the matter. An acknowledgment for an ordinary debt like the present, whether in certain respects a privileged one or not, is not at all in the same situation. It is not known to the creditors; it has not been inserted in the Balance-Sheet; it is *prima facie*, at least, a latent burden upon the Insolvent, which, by so much, would lessen his ability to meet his engagement under his arrangement. May it not be argued that such an obligation is opposed to the *bona fides* and the full disclosure of all the circumstances which ought to characterize an arrangement between an Insolvent and his Creditors? But it is not necessary in the case before us to decide the question, for I am of opinion that whatever may be said of the Bon for $150, the debtor, Boulanger, is entitled to contend that the payment made by him in or about September 1863 shall be applied to the debt appearing in the Balance-Sheet, originally due and payable on 3rd June 1862. For very obvious reasons Boulanger wishes so to apply the payment. He has a greater interest so to do than to apply the payment to the "Bon" for a month and a half's salary, and I am of opinion that looking to the rules of the Code, touching Imputation of payments, Art. 1253 and seq., he is entitled to insist that the payment shall be imputed in the manner which he desires.

It was plausibly argued by Mr. Naz for Tennant, that this payment so applied would not come up to the 40 per cent on the debt included in the arrangement, viz: $400.39 with the interest now due upon it. Counsel confined himself to asking that interest should begin to run only from the date on which the instalments ought to have been paid by Boulanger, but in fact he failed to pay them. It was argued that, altho' it was stipulated in the arrangement that no interest should be allowed on the instalments, nevertheless it was plain according to law and justice, that the original right to interest should at once revive, on failure to pay at the appointed time. It appears to me that the agreement here between parties was clearly this that the 40 per cent should not bear interest. It is said that when there was a failure to pay at the appointed day, the right to interest revived; but it seems to me that the very words of the agreement when attentively considered are exclusive of this view.

There was to be no payment of "any interest on the said 40 per cent." This I think excludes payment of interest whether before or after the dates in which the instalments were payable.

We, thus, on the one hand, have a sum of $160 due to Tennant; 40 per cent on the debt of $400 payable in instalments in the manner above mentioned. To account of this debt, we must ascribe the payment of $145 made by Boulanger as far back as September 1863. It is plain that the debt and the payment are so nearly balanced that no case has been made out for the Court to interfere here, and disturb the interests of the other creditors, many of which are of considerable magnitude. Those other creditors, as we have seen, not only do not join in the application of Tennant, but to a man, formally range themselves on the other side.

The application must, therefore, be dismissed, but looking at the whole circumstances, without costs.

SUPREME COURT.

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DONATIONS FAITES PAR CONTRAT DE MARIAGE.

Une donation faite à des époux, par contrat de mariage, est valable quoique ce don soit fait sous une condition dont l'exécution dépend de la seule volonté du donateur.

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DONATIONS,—MARRIAGE CONTRACT.

A donation made on behalf of the spouses, in a marriage contract, is not null although such donation has been made under a condition entirely dependent on the will of the person who binds himself.

—

PELLEGRIN & ORS.,—Plaintiffs,

versus

MARIUS DROMART,—Defendant.

—

Before:

His Honor Sir C. F. SHAND, and
The Honorable Mr. JUSTICE COLIN.

—

E. PELLEREAU,—Of Counsel for Plaintiffs.
A. ROHAN, —Plaintiffs' Attorney.
W. NEWTON, —Of Counsel for Defendant.
H. BERTIN, —Defendant's Attorney.

—

23*rd March* 1869.

This was an action brought by the Plaintiffs, to obtain from the Court a declaration to the effect that the real tenders made at the request of the Plaintiffs to Defendant, on the 27th July last, and the deposit of the sum tendered in the Registry of this Court, on the 28th day of July last, were good and valid, and in consequence thereof the Plaintiffs were legally discharged from the Defendant's claim against them.

The facts upon which this action was grounded were these: In the marriage-settlement of the late Pierre Sydney Pellegrin with Aglaé Dromart, dated the 22nd July 1837, one Pierre Salomon intervened and promised to give and pay the said Pierre Sidney Pellegrin the sum of $7,000. That sum was never paid, and Pierre Salomon is now dead.

Subsequently, Pierre Salomon became, in terms of a notarial deed dated 24th October 1839, the creditor of Pierre Sidney Pellegrin, for the sum of $1,266 2|3.

Pierre Salomon died, and his estate went to his Widow, Rose Perrine Marie Michel, donee thereof under their marriage settlement.

The Widow Salomon, died, and her universal legatees Noémie and Aristhène Pellegrin have transferred to the Defendant Dromart their rights against the Plaintiffs who are heirs of Sidney Pellegrin.

The Plaintiffs now say that if they are ed as heirs of their late father Pierre Sidne grin, in the sum of $1,266.66 2|3 to th of the late Pierre Salomon, the heirs o Salomon or those who hold the heirs' ri indebted to them, the Plaintiffs, in the $1000, and that by law a compensation ha place, by the force of which the heirs P. S grin are only indebted, now, in the s $266.66 2|3, with five years' interest.

The Plaintiffs further say that they sent 5|6ths of the succession of the late Sidney Pellegrin, and for their share, the tendered 5|6th of the aforesaid debt wi years interest, altogether the sum of $ which, sum after tender made, was depos the Registry of the Court.

The Defendant in the particulars by th in, in answer to the Plaintiff's statement c urged that the donation to Pierre Sidney grin, in the marriage settlement of 22n 1839, was null and void. And upon th swer which, in reality, amounts to the Defe plea, the whole argument turned. The dant not having insisted upon several otl swers put in, such as a settlement betwee ties, of which there was no evidence, presc as to two of the Plaintiffs, which was not p nor was the insufficiency of the legal ten otherwise admissible, *i. e.* if the donation held good in law, insisted upon.

The donation from Pierre Salomon to Sidney Pellegrin, in the latter's marriage ment on 22nd July 1837, runs thus:

" En faveur du présent mariage M. Sa constitue en dot à M. Sidney Pellegrin, qui cepte, une propriété au quartier des I Wilhems, de la contenance de 300 arpens en connue sous le nom de " Quatre Bananier de valeur de $200.

" De plus, M. Salomon s'oblige par ces r présentes, à compter au futur époux, qui l'ac une somme de $1000, mais sans vouloir pr à cet égard le terme de cette libération, la somme ne produira aucun intérêt."

The aforesaid donation expressly mad favorem matrimonii " the Defendant now lenges as null and void in law, groundi objections on art. 944 and mainly on art. Code Civil.

The first of these articles enacts that: " donation entre vifs faite sous des conditions l'exécution dépend de la seule volonté du teur, sera nulle."

The second (1174) enacts: " Toute obli est nulle lorsqu'elle a été contractée sous condition potestative de la part de celui q blige."

The first article more specially, applies t nations: the latter to obligations in general

It was strongly urged that altho' Article 947 excludes the operation of Art. 944 from marriage contracts, yet Article 1174 applies to all contracts in general and vitiates them when they are made solely and entirely dependent on the will of the person who binds himself, and a good deal of discussion took place as to whether Article 944 was a mere adaptation of Art. 1174 to donations in particular, or a separate and stricter application of a general principle to a special species of contracts, leaving untouched, however, the general principle itself, so that although marriage contracts would, by Art. 947, be excluded from the operation of Art. 944, yet the contract woul still be null by force of Art. 1174.

This argument seems to us perfectly untenable; if Art. 944 is not (and it is not necessary to inquire whether it is or not) a mere application to a special contract of a general law, it is a more severe enactment.

"Il faut dire avec Mr. DEMANTE & Mr. ZACHARIÆ," says MARCADÉ, commenting on this Art. "que la règle particulière de nôtre Article présente un autre sens et se trouve beaucoup plus sévère que la régle générale de l'Article 1174. Dans notre article 944 il ne suffit pas que le donateur s'oblige sérieusement, il faut qu'il s'oblige irrévocablement et de manière à ne pouvoir, par aucun moyen, se soustraire plus tard au lien qu'il s'impose."

And yet that solemn obligation which the law of donations requires, that nullity which results from the fact that the conditions of a donation cannot be left dependant on the sole will of the donor, all this disappears when the donation is one of those mentionned in the 8 and 9 chapters of the Tit: 2. of 3rd Book of the Civil Code, a donation in a marriage contract, for example. There the maxim "donner et retenir ne vaut" disappears, and provided there is a gift, that gift is held binding upon the donor, even when its conditions would make it worthless in cases which do not come within the favoured contracts of chapters 8 and 9.

No doubt there may be cases in which Art: 1174 might operate, cases in which the gift instead of being saddled with conditions dependent on the will of the donor would be conferred in such terms as to be no gift at all: "I will give, if I will give." There is there no gift as yet: But great is the difference, however, between such locutions which hardly mean anything and the expression of conditions which touch more the execution of the gift than the fact of the gift itself. "I will give if I go to Rome; I give, but when I shall realize the gift, I do not say," are the expressions of gifts under potestative conditions, dependent on the will of donor, no doubt; but it is the execution of the gift which is delayed and altho' such execution is left to the will of the donor in such a way as to vitiate the gift in other cases, the gift is not vitiated when it is a gift in a marriage contract, for instance. The vinculum exists; the gift is made, the execution may be delayed; but authors generally agree, is delayed at latest until the death of the donor when the exercise of his will can no longer delay the execution of a promise or gift which is a fact. LAROMBIÈRE, TOULLIER, TROPLONG and DURANTON which have been cited to us, lay down the principle positively, and altho' they may differ from one another as to secundary questions, namely as to whether art. 944 and Art. 1174 are but the repetition of the same legal principle, on the main point they agree.

In reality what is the object of the law? The law plainly has intended to favour the contract of matrimony and has, with that view, swept away many of the nullities which attach to other contracts. We first meet with the chapter of the Code which treats of Donations in general, and when we have read that no donation shall be valid which is encumbered with a condition which depends on the donor's sole will, we immediately after come to another enactment (947) which excludes marriage contract from the operation of that article and several others. We proceed, and when we come to those special donations which are made by marriage contracts, we find another article (1086) repeating the same law, derogating from Articles 1081, 1082, 1084, 944... enacting specially that donations may be made "sous d'autres conditions dont l'exécution dépendrait de la volonté du donateur par quelque personne que la donation soit faite," and further "en cas que le donateur par contrat de mariage se soit réservé la liberté de disposer d'un effet compris dans la donation de ses biens présents, ou d'une somme fixe à prendre sur ses mêmes biens, l'effet ou la somme, s'il meurt sans en avoir disposé, serait censé compris dans la donation et appartiendrait au donataire ou à ses héritiers."

If then article 944 had not been enacted, article 1086 would protect donations in marriage contracts from the nullities which attend conditions left dependant on the donor's own will. The enactment of article 1086 which is found in the law special to such donations after the enactment in article 944 which is found in the law relative to donations in general, clearly makes out the will of the legislature to withdraw from the operation of general nullities a contract evidently looked upon with favour by the law. In the case now before us, the intention of the donor is very plain, and the terms are strong. He does not promise to make a donation, he does not say: "I may give, I will give, if I choose to give," he makes the donation and it is accepted; the contract is a fact, the term of payment is postponed, postponed in such a way that might possibly vitiate several other contracts, but does not vitiate this; the time of execution is left dependant on the will of the donor; the realisation of the contract he can postponed, but the contract exists, it has been accepted, "*præsens obligatio est, sed dilata solutio.*" It would not be difficult to find authorities of very great weight who, in contracts in general, find a great difference between "dare *si* voluero, and dare *cum* voluero.

But there is no necessity to inquire further and to decide whether this donation would be good if found in another contract but a marriage settlement, and such contracts as come within chapters 8 and 9 of Title III. It is sufficient to inquire, and we have inquired whether it is to be maintained when found in a marriage contract.

We have already cited, generally, authorities who, in principle, come to this conclusion; the law, by itself, we think perfectly clear if we were left to the sole light of our own judgment; still there are two authorities of the greatest weight not cited to us which we think so decisive on the point that we can hardly refrain quoting them.

MERLIN, *Rep. Vo. Institution Contractuelle* § 10 p. 395, after showing the distinctions between a simple *donatio inter vivos* and *institution contractuelle*, says: "L'institution contractuelle fait un "héritier irrévocable" and adds; "une autre "raison non moins décisive est que la disposition "des coutumes et de l'Ordonnance citée n'a "point lieu même à l'égard des donations entre "vifs lorsqu'elles sont faites par contrat de ma- "riage; c'est ce qui résulte de la maxime qu'on "peut donner et retenir par les actes de cette na- "ture, et c'est ce que l'article 18 de l'Ordonnance "de 1731 et l'article 947 du Code Civil ont dé- "cidé en termes précis."

According to this eminent author the maxim "donner and retenir ne vaut" does not apply to donations *inter vivos* made by marriage contract, and he gives to Article 947 the fullest extent that the Plaintiffs contended it should receive.

The Cour de Cassation in *Loden* v. *Syndic Loden* (27th December 1815 CH. 1815. 1. 129) held, reversing a decision of the Cour de Riom which had annulled a donation in a marriage contract because it had been made under a condition the execution of which depended on the sole will of the donor, that "cette règle générale (944) reçoit une ex- "ception formelle à l'égard des époux ou leurs "descendants, exception littéralement consignée "dans l'article 947 et développée ensuite dans "l'article 1086 qui autorise, en effet, dans ces "mêmes donations, l'apposition des conditions "dépendantes de la seule volonté du donateur; "qu'il suit de là que l'arrêt attaqué, en déclarant "nulle la donation portée au contrat de mariage "de Loden fils, pour le seul motif que le donateur "s'était réservé la faculté de régler à son gré les "parts héréditaires de ses autres enfants, a fait "une fausse application de l'article 944 et for- "mellement violé les articles 947, 1086, Code "Civil; casse &a.

There is nothing, in the argument, that if the gift is realized after the Donor's death, it must be considered as a gift in view of death; as a fact, the gift is realized after the Donor's death; but it need not have been postponed, the contract might have been executed the day after the settlement was signed. It is a donation *inter vivos* on account of the Donor's marriage, and nothing else.

The Judgment is for the Plaintiff, with costs.

SUPREME COURT.

PREUVE TESTIMONIALE,—NOTAIRE,—CLERC DE NOTAIRE,—SECRET.

En matière civile, une partie en cause ser à ce qu'un clerc de notaire, appe moin, révèle à la Cour une conver que la partie a eue avec le témoin, e de clerc de notaire.

EVIDENCE,—ORAL PROOF,—NOTARY PRIVILEGED COMMUNICATIONS.

In civil matter, one of the parties to object to a notary's clerk, called as cause, giving evidence concerning a munication made by such party to th his professional capacity.

ARTHUR RAYNAUD,—Plai

versus

F. DURHONE AND WIDOW A. É D

Before:

His Honor Sir C. F. SHAND, Kt
His Honor Mr. JUSTICE COLIN.

L. ROUILLARD,—Of Counsel for Plai
V. DUCRAY, —Plaintiff's Attorney.
E. PELLEREAU,—Of Counsel for Def
A. ROHAN, —Defendants' Attorn

17*th Ma*

In the course of this case in which tiffs seeks to obtain a Judgment setti certain sale made by one of the Defe rhone, to the other Defendant, Wid Ebrard, of a house situate at Port Lo alleged ground of the fraudulent na conveyance, witnesses were heard in the allegations of fraud; one of them dore Sauzier, a Notary public, being amination, was asked to report wha had stated to him, at the office of M Notary public, whose senior and man Mr. Sauzier then was. Mr. Pellerea to the question, on the ground that the cation was privileged, and that even i zier were willing to answer and to client's secret, whatever may have bee ture of the communication then made not to be allowed so to do, as the pri not Mr. Sauzier's, but the client's pri

E. PELLEREAU cited, in support of Art. 300 of the PENAL CODE which en "Any physician, surgeon, or other " "santé" as well as any pharmacopolis "or any other person, who may, in con "his or her profession, or avocation, l "depository of any secret confided "her, and who, except when compelle "to become informer, shall reveal su "shall be punished by imprisonmen

" ceeding six months, and by a fine not exceed-
" ing fifty pounds sterling."

L. ROUILLARD insisted, urging that the Notaries were not named in the Article, and that it had been held by the " Cour de Cassation " in a Decision of 23rd July 1830, that the Notaries are bound to answer, as their duties are regulated by the law of " 25 Ventose an XI," and therefore do not come within the provisions of the Penal Code. Besides, the said Sauzier was, at that time, not a Notary, but a Notary's Clerk. He also cited CHAUVEAU and FAUSTIN HÉLIE, Vol. I p. 524.

PELLEREAU, in reply, relied on the almost unanimous opinion of the best writers who have written on the subject, also a Decision of the Court of Bordeaux, 16th June 1835; another of the " Cour de Montpellier," 24th November 1827, he also referred to the law as laid down in TAYLOR'S Treatise on Evidence.

JUDGMENT.

The law of Evidence in Mauritius is, in many cases, widely different from the law of Evidence in England, and when that is the case, it is the duty of this Court, even if it did prefer another system to that traced out for this Colony, in the Codes, resolutely to decline instilling into our jurisprudence, rules which are not legally binding, and which might tend to shake the certainty of our law and create confusion and doubt where we find order and harmony. But there are cases, and not a few, where the rules of evidence are the same, and where far from having to apprehend the undue influence on our minds of a system which is not our own, we may well gather from the learning of other courts and writers, the light which help us to find our way through contrary Decisions and contradictory opinions. By the law of the Codes and by the law of England, certain communications are privileged; certain communications which are privileged in France may not be privileged in England, as for example " communications to a physician or to a priest or clergyman "; but communications made by a client to his Counsel, to his Attorney, to his Agent, are privileged, and we conceive they are justly privileged. By an Article (300) of Penal Code, which is but the reproduction of the Article 378 of the French Penal Code, it is made a criminal offence for any Physician, Surgeon or ' Officier de Santé,' Pharmacopolist, Midwife, or any other person who may, in consequence of his or her profession, become the depository of any secret confided to him or her, and who, except when compelled by law to become Informer, shall reveal such secret, shall be punished, &c., &c. It was urged that the words ' other persons ' could not apply to a Notary and that communications to him were not privileged.

Before the promulgation of the French Codes, there was some doubt whether communications made to a Notary were privileged. Most Jurists however, held that they were:

There is no doubt that there is to be found no article in the Codes, from which it can be inferred that it was intended to take the privilege away; on the contrary, the article in the Penal Code above cited, the principles of which have been commented upon by many writers, seems to lay down the law distinctly; the professional persons mentioned by name are certainly Physicians and members of the medical branch of science, but it is quite plain that the article is not limitative; ' any other person ' that becomes the depository of a ' secret,' on account of his profession, is prohibited from revealing it. Advocates and Attorneys are not mentioned by name, and yet there is no doubt that communications made to them are privileged if made to them professionally. It is but the application of the rule of the Roman Law. (*Dig. de Testibus*) "Ne patroni ni causa cui patrocinium proestiterunt testimonium dicant." Why should Notaries be excluded from a rule which seems just, and when the statements made to them are not only quite as confidential, but oftentimes much more so than those made either to Advocates or Attorneys? The Notaries of Mauritius are the conveyancers of Mauritius, the professional gentlemen part of whose business it is to settle family affairs, partitions of property, professional duties which require not only learning judgment and tact, but, above all, discretion and confidence It is true that the privilege may, in some cases, be detrimental to the interest of Justice; it is not the less true that just rights might not be vindicated if the communication he makes in confidence to his Attorney or his Notary, were to be used against him, for, no fact could then be communicated without being accompanied by a precise and detailed series of circumstances attending it, although quite immaterial to the special communication. Now, this would, in most cases, not be done for the very reason that it being immaterial, it would not be thought of, and the result would be that the bare fact communicated would be, might be, at least, unfairly used, or it would be done, and if done would be done for a purpose strongly coloured. The degree of inconvenience always, of positive injustice often greatly preponderates over the mischief which may in some cases be caused by the use of the privilege.

Most of the authors who have written on the subject are clearly of opinion that such communications to a Notary are privileged, and several Courts of Appeal in France have so decided it. It appears, however, that the Court of Cassation in re: *Cressent*, 23rd July 1830, held that a Notary was bound to give evidence " la
" dispense introduites en faveur des Avocats
" et des Avoués est une dispense exceptionnelle,
" une mesure d'ordre public établie par la juris-
" prudence en faveur du droit sacré de la défense,
" qui prédomine tous les autres, et ne peut ni ne
" doit être étendue aux Notaires dont la profes-
" sion ne les appelle pas à exercer cette défense."

On reading the Judgment which contrary though it be to the Decisions of the Court of Bordeaux et Montpellier and of the Tribunal of Melun, 11th December 1820, is however the expression of the law as laid down in the Supreme Court of France, we find that the case was a criminal one and not a civil suit, and that the Court when alluding to the opinion of those lawyers who sustained the privilege, say this " qu'il ne s'agit dans

" l'opinion de ces auteurs que d'intérêts civils " entre personnes privées, et qu'il n'en pourrait " être rien induit en matière criminelle et contre " l'action de la vindicte publique. "

Not only, therefore, does the 'Cour de Cassation' decide the point on a criminal case, and the cause before us is a civil action, but the terms of its very Judgment seem to point out that there exists in the minds of the Judges a great difference between the application of the rule in Civil cases and its application in criminal prosecutions.

It might be urged, that although, as a mesure of expediency and policy, such communications may well be held privileged in civil suits where the interests at stake are those of private individuals, but that the rule ought to be made to yield in criminal matters where the interest of the public at large in the prosecution of offences, requires that measures of private expediency and policy should bend before measures of public safety and public justice. Private interests should be made to yield to this important rule, but this important rule should be made to bend for the sake of public Justice.

On this point, however, we give no opinion; we merely notice that the Decision (given by the Cour de Cassation) in the case of *Cressent* applies to a matter of a strictly and absolutely criminal nature.

But the Cour de Cassation, itself, in a criminal case also, has lately in *re*: *Lamarre* (S. V. 53. I. 379) changed its jurisprudence and laid down a doctrine very different from the one which, in 1830, had been, contrary to the opinion of several Courts, held to be the law. Whilst affirming the Judgment of the Court below, which compelled the Notary to give evidence in a criminal cause, because as a matter of fact it was not shown that the statement made to the Notary had been made under the seal of secrecy, but merely made to him in his capacity as a Notary, and that this was not sufficient, the Court said: " que les intérêts des familles peuvent exiger, en effet, dans des cas particuliers, que les confidences qui sont faites aux Notaires ne soient pas divulguées et que les graves inconvénients qui pourraient résulter de cette divulgation doivent motiver une limite au droit de l'instruction, mais que cette dispense doit être restreinte, conformément aux règles générales de la matière, au cas seulement où elle est strictement nécessaire à l'exercice des fonctions Notariales. "

Here, notaries are placed in the same position, even then those actually named in the article; their privilege is recognized, but the Court traces atdistinction between those cases in which the satement has been made as a secret is communicated, and does not extend the rule so as to cover every communication made to the Notary.

In this case the " Ministère Public " give his conclusions in favor of an absolute privilege.

DALLOZ, Vo. *Révélation de secrets* p. 13, strongly approves the doctrine which upholds the privilege. The case before us is not a criminal case and, we repeat, as to criminal cases, we are not called upon to give an opinion; it is a civil suit; we find authority to support the privilege suits; we find none to discard it; we find when adverse to the privilege, the "Cour d sation" suggests a distinction between civ criminal cases; and we also find that even minal cases, its later jurisprudence has greatly modified and has been modified sense which we, in civil cases at least, thi sound and legal one. We can see no reason why communications to an Attorney s be privileged and communications to a "No not be privileged; the Notary seems to us just as often called upon to receive commu tions made confidentially and which would n made if the rules which protects them were set aside. Mr Sauzier tells us that the com cations made to him were made to him as clerk to the Notary Mr Pelte, and that if h not been a first clerk to a Notary and occupi situation which he occupied at Pelte's offic Rhone would not have come to him. Du H it is true, was not the ordinary client of th fice; but there is no difference, so far as th vilege goes, between the communication ma one to his Notary, when he first applies t Notary or when the application is made aft veral year's connection. Applications for lo money are often confidential applications, say Sauzier, and Mr Sauzier, unless compelled clines to answer.

Now, just as an Attorney will not be ma disclose a confidential communication, an A ney's clerk will not be called to prove one, i which is law as to an Attorney is law as to s tary, that which holds good as to Attorney's must, by parity of reasoning, hold good as Notary's clerk in like circumstances.

The privilege exists in England as we that it does in our law; we can, we think ther light from the learned decisions of the lish Courts, the case of *Taylor v. Foster* 2. C P. 195. *R. v. upper Boddington* 8. D. and R. leave the case beyond a doubt. The clerk is c dered as the organ of the Attorney and is u the same conditions of "secrecy," at least a as Sauzier was, a confidential managing cler whom communications were made as they n be made to the titular Notary.

We say nothing as to what the Dec would have been if Pellereau had waived the vilege and Sauzier had still declined to answe

Here, Pellereau has not waived the privi he insists upon it. Mr. Sauzier will not be c upon to answer the question put to him.

SUPREME COURT.

SÉQUESTRE.

Lorsque, sur une demande de séquestre, les co tions proposées et débattues à l'audience sont difiées, la Cour, si ces modifications sont im tantes, fixe une nouvelle audience et fait noi les nouvelles conditions aux créanciers hypo caires qui ont laissé défaut lors de la pren audience.

SEQUESTRATION.

When upon an application to place a landed property under sequestration, the terms of such application are modified, the Court, if such modifications are of some importance, will appoint a new sitting and cause such new conditions to be notified to the mortgage creditors who have not attended the first sitting.

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FÉLICIE CHAUVIN,—Plaintiff,

versus

THE CREDITORS OF THE "ALBION" ESTATE, Defendants.

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Before:

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P. L. CHASTELLIER,—Of Counsel for Plaintiff's.
A. J. COLIN, —Attorney for same.
G. GUIBERT, —Of Counsel for Liénard.
M. SAUZIER, —Attorney for same.

—

25*th March* 1869.

In this case the Plaintiff, co-owner of the "*Albion*" estate, of which the sale by Licitation has been begun, has applied to the Court, for an Order to sequestrate the estate, and also for an Order in virtue of which the sequestrator would make certain payments and advances on account of the Estate. Mr. GEORGE GUIBERT, for Cheri Liénard, first objected to this application, but subsequently consented to it, provided that no further sum arising out of the sequestrator's privilege should encumber the portion of the "*Albion*" Estate over which he, Cheri Liénard, has vendor's rights, than $100 a month. The position thus assumed by Liénard and to which the owners of the Estate do not object, has entirely changed the original application. Creditors who did not appear to object to a sequestration, the privilege arising out of which would encumber the whole Estate, may well object to such privilege being in reality restricted to that portion of the "*Albion*" Estate, over which they have hypothec or other rights, and the qualified assent of Mr. Guibert would practically have that result. Before we enter, therefore, into the merits of this application, we order that new notices be served upon those on whom the original notice of motion was served, and new advertizements be inserted to the effect that the sequestration Order prayed for is intended not to charge with the privilege arising out of it, the whole *Albion* Estate, but the *Albion* estate minus the *Mon Plaisir* plot of ground which it is intended not to charge with any sequestrator's privilege beyond the sum of $100 a month.

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BANKRUPTCY COURT.

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FAILLITE,—ASSURANCE SUR LA VIE.

Motion à la requête de l'un des créanciers du failli, ayant pour but de faire ordonner la vente d'une Police d'Assurance sur la vie, prise par le failli et formant partie de son Actif. Motion combattue par les Syndics de la faillite et refusée par la Cour.

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BANKRUPTCY,—LIFE INSURANCE POLICY.

Motion made at the request of one of the creditors of the Bankrupt, for an order directing the assignees to sell a Policy of Insurance on the life of the Bankrupt, and forming part of the Assets of the latter. Motion objected to by the Assignees and refused by the Court.

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J. R. THOMPSON & Co.,—Plaintiffs,

versus

ASSIGNEES N. WALLACH,—Defendants.

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Before:
His Honor Mr. JUSTICE COLIN.

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J. H. SLADE, —Attorney for Thompson.
E. DUVIVIER, —Attorney for the Oriental Bank.
P. L. CHASTELLIER,—Of Counsel for Assignees Wallach.

—

20*th April* 1869.

On the 8th March 1869 J. SLADE moved on behalf of J. R. Thompson & Co., for an Order directing the assignees of N. Wallach, a bankrupt, to sell the books and remaining assets of the bankrupt. The object of the application which was general in its terms, was, in reality, to have a policy of insurance on the life of the bankrupt, and which has been transferred to the assignees, at the assignees' instance, sold; the remaining outstanding debts, if any, being considered worthless, and the price of the real property once possessed by the bankrupt having been distributed. This motion was opposed by CHASTELLIER for the assignees and by DUVIVIER for the Oriental Bank.

The 125th Section of the Ordinance of 1852 allows the books and outstanding debts of a Bankrupt which cannot, in the opinion of the Court, be collected or received without unreasonable or inconvenient delay, to be sold by the assignees under the direction of the Court, in such manner and under such directions as shall be considered by the Court. This, however, could not be done before the expiry of two years from the issuing of the Fiat, under the Ordinance of 1852, a delay now reduced to one year

by the amending Ordinance of 1864. In this case, the sole object of the motion being to have an Order to sell a certain Policy of Insurance on the life of bankrupt. The issue before me was the usual one in such cases, whether it was reasonable or convenient to sell this Policy, at once. The assignees decline to sell it, preferring to pay the annual premia and realize, at the death of the Bankrupt, the full amount of the policy, *i. e.* £2000 (ten thousand dollars) rather than part with a contract which, as they assert, would be worth only £240 if sold in England, still less if sold in this Colony. The Creditor who makes this application has laid before me no evidence to satisfy me that it would be reasonable or convenient to interfere with the assignees, and to substitute to their Judgment the opinion of a single creditor. It may be true that such policies are sold in England, but it is not the case that they are usually sold here, not one precedent has been quoted to show that this is done, or if this has ever been done, that the transaction was favourable to the interest of the general creditors. It was distinctly asserted by the assignees, and not denied by the applicant, that the life which has been insured is not one which can be considered good, and if that be the case, the assignees are, *à priori*, right to nurse the contract, so as to obtain its full value rather than run the risk of sacrificing it by a premature sale.

They have in hand money enough to pay the premium of the Policy for five years; after that time, if it be necessary, it will be for them to consider whether it be prudent to raise money upon it, so as to keep it up. It was urged that it was not a moral contract; the contract, if immoral, would have been so from the first, and I fail to perceive how it would be immoral in the Assignees to keep up the Policy in the interest of all the Bankrupt's creditors and not immoral for a third party, creditor or no creditor, to buy the Policy and keep it up in his own interest.

Policies of life insurance are not generally looked upon as immoral contracts; they are viewed favourably by the law, and the greater development, the more general adoption of those and similar contracts, far from tending to shake public morality, would, I conceive, create and foster habits of thrift, prudence and foresight by which communities grew wealthier, better and wiser.

The applicants will take nothing by their motion which is dismissed with costs.

BANKRUPTCY COURT.

FAILLITE,—LIVRES IRRÉGULIÈREMENT TENUS,—REFUS DE CERTIFICAT.

BANKRUPTCY, — BOOKS IRREGULARLY KEPT, — REFUSAL OF A CERTIFICATE.

Bankruptcy H. DINNEMATIN.

Before:
His Honor Mr. JUSTICE COLIN.

E. PELLEREAU, —Of Counsel for Bankrupt.
A. ROHAN, —Bankrupt's Attorney.
P. L. CHASTELLIER,—Of Counsel for Assignees.
F. VICTOR, —Attorney for same.

22nd April 1869.

In this case, E. PELLEREAU, for the Bankrupt, applied on the 15th March for a certificate of conformity, the Assignees, by P. L. CHASTELLIER, strenously opposed the certificate, and complained that the conduct of the Bankrupt had been fraudulent and that his Books disclosed such gross and wilful omissions and statements, that he was not entitled to a certificate. The main points urged on both sides are taken notice of in the Judgment.

There is no doubt, as Mr Pellereau argued, that blunders, irregularities in the books, when candidly explained and when the whole conduct of the Bankrupt, however, imprudent and even reckless, shows, that no part of the Estate has been kept from the Creditors, will not *per se* deprive a Bankrupt of the remedy which the law holds out to him. Many a mistake may be made, which can be amended, many an error of judgment may be excused freely or under conditions as the case may be, but when gross mistakes do occur, when many errors are found which may be errors of judgment, but may, likewise, be much worse, the Bankrupt must explain, and if he do not explain so as to carry conviction, or at least create a reasonable doubt, he cannot expect to obtain an unconditional certificate.

In this case, the Bankrupt starts with a strange process, in order to make the two sides of his balance-sheet tally; he carries to his credit, he says as matter of explanation, the losses he has suffered according to his account. If he could show those losses, explain them by his books, the process he has adopted might be only singular, although it is strange that these expenses and losses should have been so incurred or suffered as to balance the liabilities exactly to the last cent.

But these expenses and losses do not appear from the Books; if the Bankrupt paid $675 for medical attendance; $1,947 for interest and discount; $375 for cartage; those sums should regularly appear in his Journal and in his Cash Book; if his losses on goods, losses experienced, he writes in that balance sheet, by the fall of the goods, that surely can, by comparison of the Books of purchases and his book of sales, be tested, and except for one or two insignificant items to which my attention was drawn and which, after all, are anything but clear, there is no proof, that I can see, that those sums have been lost or spent in the course of the Bankrupt's trading through over specula-

tion or any other cause. Now here is not one omission, or fifty omissions; there is a series of omissions which are such that they are not explained by the other books, they are not verified by any entry I can trust, I may say by any entry, at all. This balance sheet, therefore, is more in the shape of an argument than a real statement and, if the argument is fanciful, it is not conclusive, not even plausible. In fact what has become of all that money? When and how was it spent? On what occasion and on account of what goods were the losses suffered? The books do not show, when referred to in the proper place, where the entries should appear, and I am not shown any other entries which can explain or justify these so-called omissions.

In connection with this part of the case, a fact was brought to my notice, which, *per se*, may not be of great value, but which assumes a very suspicious character when it is viewed at the same time as those omissions and irregularities; I speak of all those omissions and irregularities, which concern his "Balance of Assets". Up to a certain time, it appears up to 1866, the Bankrupt had a Bank account, he paid into and drew upon the Bank; a wise mode of proceeding, for several reasons, but one which a trader is, after all, not bound to follow; be that as it may; up to 1866, he had an account with the Bank; from that time the account ceases entirely, no more money paid into the Bank, no payment made by Dinnematin by means of cheques on the Bank; and yet I am told that he received and paid altogether large sums of money; now the most striking irregularities, surcharges in the Books, alterations of figures, post entries to make up a balance are mainly since that date; why that sudden and unexplained change? it may be that the new mode of doing business was a more rapid, a safer one, although I fail to perceive why and how; but it may also be, as the assignees suggest, there being no trace of any payment into or draft upon the Bank, and the Books showing almost constant irregularities, that sums of money may have been received which are accounted for and of which it is impossible to trace the origin or to follow the destination. When, for instance, I find in books which are called note books, but which are neither the Rough Draft Day Book, nor the Journal itself, nor the Cash or Sales Book, that sums of money have been received from divers persons, to wit: in Book No. 19, on 24th September, 19th December, 10th December 1867, 5th October 1866, how can I know whether that money has been privately kept by the Bankrupt or paid into the cash account, whether larger sums still have not been received? If I turn to the "Main Courrante" I find no entry, and if I turn to the Cash Book I find no entry. I cannot be satisfied with the explanation that the note Books were kept apart from the other Books and were intended for such goods that were sent out to be looked at; if kept by the customer and credit given, the entry was made when payment was effected; but the sale of the goods should appear in the Journal; the payment I should find trace of in the Cash Book; I find neither the one nor the other, and it can hardly be urged that these Books were separate Books *to be* considered by themselves alone, for they refer not to separate goods having a separate account, but to goods forming the general stock of the trader.

I cannot consider all this as a mere irregularity, I think it worse, and I am afraid that one of the keys to these omissions, which I must fain consider wilful omissions, is to be found in the fact of the house built at Roche Bois, during the Bankrupt's course of trade and owned by the Bankrupt's intimate friend, Miss Léonide Boisset. That Léonide Boisset had money in the Savings Bank, is perfectly true, that, besides that sum, she may have had money kept by her at her private residence, is also possible; but the house cost, altogether, it is admitted, $3,500, and the sum she had at the Bank, falls very short indeed of that amount. Now it is exceedingly suspicious that there is not a title of evidence which can be shown of the fact she earned money by buying goods at auction and selling them again; no vouchers, no memoranda, no receipts, no witnesses, nothing. Whilst on the other hand, except for the notarial purchase and acquittance deeds which she signs herself, nothing is brought forward to prove that she bought or paid for any portion of the material used to build the house. The witnesses all dealt with Dinnematin, received their money from Dinnematin, upon accounts in Dinnematin's name; Edouard Pierrot, the timber merchant, says, the Bankrupt told him he was building at Roche Bois and gave him his "Bon" once and accepted his accounts; but since the Bankruptcy and when the witness had been subpoaened, the Bankrupt went to him and said the timber had been purchased to build a house for Miss Boisset whose name had never been mentioned before the Bankruptcy. Another circumstance again occurs: the Bankrupt says that the house was built on account of Miss Boisset and paid with her money; now, when Frappier who is not married to but who lives with Léonide Boisset's sister is sent by Dinnematin to Pierrot to pay him a certain sum on account, Pierrot declines and says that Dinnematin owed him much more, but that if Miss Boisset would guarantee the amount due to him by Dinnematin, he would accept $50 in part payment.

But this is delivered by Dinnematin who says that certainly he would not ask Miss Boisset for her warranty. Why not, if the house is in reality Miss Boisset's? Dinnematin added, it is true, says the witness, that Miss Boisset had given him money; what has he done with it? where does it appear in his books, as money received? After reading the evidence of Anfray, Pierrot, Frappier and Léonide Boisset herself, upon this point, the gravest doubts remain in my mind, and although it may be that the assignees do not find sufficient evidence before them to bring an action declaring the house in question to be, in reality, Dinnematin's house, and they are surely right not to risk good money if their case in not complete, still, for the purposes of this Bankruptcy and dealing with the Bankrupt alone, and in no wise touching the rights of parties that are not before me, I am not satisfied with Dinnematin's statement. I am not satisfied with Léonide Boisset's account of the transactions touching the house at Roche Bois.

As I have already stated, the spirit of the law is not to punish omissions and irregularities in Book keeping, which can be explained; but what inference can I draw from what has been by the assignees, and not without truth, stated to have been a systematic plan of carrying all sums received or surcharging books? The "main courante" and the Cash-book do not agree; this occurs constantly; yet the additions tally. But there are alteration in the "main courante" Book; *vide* 1st Book "main courante," alterations such that whilst anxious, so far as I can, to give the Bankrupt the benefit of any reasonnable doubt that his explanations may have created in my mind, I am led to believe that Mr. Descoins, the assignee, is right when he says that one word, and that word is "Déficit," is the only way to account for this strange state of things.

It is very true that in the minute investigation which this Court has been able to make, it occasionnally happens that the Books show that Dinnematin would have received more than he has actually received; but to say the least of it, this would hardly be a sufficient explanation. I am of opinion that adding to one side of the Book a lump sum to make up a balance, must almost, to a certainty, be a false entry. Whether with the premeditated intention to deceive, may or may not be the case, but in either case, a false entry quite unworthy of the slightest confidence. It really seems as if the Bankrupt thought that if the additions were correct, the entries to make up the items to be added up were perfectly immaterial and might be left to the freaks of his fancy. The evidence of Descoins seems to me very strong and is not, I think, shaken by that of the Bankrupt's accountant who points out mistakes made by Descoins. In comparing the two statements with the books, there is a great deal of trust in what Descoins says when recalled: "I had turned my attention merely to the more material errors, and the mistakes pointed out by Dinnematin, merely added to the number of mistakes in his books." The Bankrupt is charged with having obtained goods from his creditors under the false statement that he was not embarrassed in his affairs. There is no doubt, he told, that if some time were given to him, if he could get goods to assort his shop, all would go well; there is no doubt that with his scanty and limited trade, having neither large operations from the successful issue of which he could expect to recover his position, nor any anticipation of crops which however delusive often, might have created hopes which are occasionnally realized, he could hardly suppose that he would right himself and lay a brighter state of affairs before his creditors. Still, of his stood alone, there is not enough in the somewhat indistinct notion conveyed to the Court by the statement of conversations held at one time with the Bankrupt, at another with his broker, to lead me to refuse a certificate; but this does not stand alone, and coupled with the very unsatisfactory account of his sales, of his receipt, I am compelled to believe that in this occasion also, the Bankrupt's conduct has lacked candour and fairness.

It was urged that the Bankrupt's losses arose greatly from the fall in the price of piece-goods on this market. This point which I have already incidentally noticed, is not made out, except in one or two petty instances in which a loss is proved upon the sales of goods, instances which, after all, are not clear and relate to sale prices which may not apply to the special goods said to have been bought at a higher price. There is no connexity. But I may assume that just as prices rose during the Civil War in the United States, when peace was restored prices may have fallen; but Descoins states that this would affect a trader like this Bankrupt in no very great measure. In fact he used to buy almost month by month, and sell almost as much as he bought; he would, in a limited measure, profit by the rise, in a limited measure lose by the fall. He may have done both, the trading extending over a period antecedent to, and a period posterior to, the end of the war. But this does not appear from the Books; it has not been pointed out to me, except as I have just stated above, and surely if instances of important losses had occurred, those important instances might and could have been pointed out from the Books.

On the whole, then, I must refuse the certificate prayed for, and withdraw protection for two years. At the expiry of three years, the Bankrupt may apply again, in terms of the Ordinance.

SUPREME COURT.

CERTIORARI, — CONTRAVENTION, — CROWN PROSECUTOR, — CROWN SOLICITOR, — PROCUREUR ET AVOCAT GÉNÉRAL, — PLAINTE.

Le Procureur Général de cette colonie, a seul le droit d'exercer des poursuites pour toute offense commises en cette île. Devant les Cours de District en matière correctionnelle, il peut se faire représenter par toute personne capable; mais ces poursuites doivent être faites en son nom et signées par son représentant. Des poursuites en pareille matière ayant été faites par le 'Crown Solicitor' au nom personnel de ce dernier, et en sa qualité de représentant du Procureur Général, ont été annulées par la Cour.

CERTIORARI, — CONTRAVENTION, — CROWN PROSECUTOR, — CROWN SOLICITOR, — PROCUREUR AND ADVOCATE GENERAL, — INFORMATION.

The Procureur and Advocate General of this colony is the only officer empowered by law to prosecute offenders in this island. He is empowered to depute any fit or proper person to prosecute, under his (the Procureur General's) direction, all offences triable by and before the District Court; but such prosecution must, under pain of nullity, be made in the name of the Procureur General, and signed by such deputy. Where such prosecution was made by the Crown Solicitor in his own personal name, as deputy of the Procureur General, the Court held the information filed by the Crown Solicitor, to be null.

THE HON. THE ACTING PROCUREUR AND ADVOCATE GENERAL

versus

THE JUNIOR DISTRICT MAGISTRATE OF PORT LOUIS.

—

Before:

His Honor SIR C. F. SHAND, Chief Judge and
His Honor Mr. JUSTICE BESTEL.

—

The Hon. J. L. COLIN, Acting Procureur & Advocate General, of Counsel for the Crown.
The Hon. V. NAZ, —Of Counsel for the Junior District Magistrate.

—

28*th April* 1869.

This was a motion for a Writ of *Certiorari*, to remove to the Supreme Court, a Judgment given on the 20th day of March 1869, by the *Junior District Magistrate* of Port Louis, in the matter of the prosecution of *Fabien Pastourel*, Doctor of Medicine, before the District Court of Port Louis The said Writ was prayed for, on the following grounds :—

Firstly. Because while the District Magistrate admitted that one *William Greene*, styled *Acting Crown Sollicitor*, was duly deputed by HER MAJESTY'S *Acting Procureur and Advocate General* to prosecute the said Fabien Pastourel, he (the District Magistrate) held and decided, contrary to law, that the said William Greene was not entitled in virtue of the powers so deputed to him in his own personal name, and as such Acting Crown Sollicitor, to lodge an Information against the said Fabien Pastourel.

2ndly. Because the Magistrate held and decided that, even if the said William Greene had the right to lodge the said Information, it should have been lodged on affirmation, whereas, in law, the said Information did not need to be affirmed by the said William Greene, inasmuch as in virtue of the powers deputed to him as aforesaid, the said William Greene was Crown Prosecutor in that case.

Upon notice of the intended motion on the part of Honble. the Procureur and Advocate General to the District Magistrate, the latter hastened to send up to the Court the Record in the matter of the prosecution by the said William Greene against the said Fabien Pastourel.

The presence of the Record in Court rendered useless the issuing of the writ of *certiorari*; the Court, therefore, at once proceeded with the hearing of the motion on its merits.

The Honorable the Procureur and Advocate General supported his first ground of objection to the Judgment delivered by the District Magistrate, by reference to Art. 1 of Ord. No. 29 of 1853 (commonly called "Criminal Procedure Act") which runs in these terms: "Her Majesty's "Procureur General, in the colony, is empowered "to *prosecute* all offenders in the name and on "behalf of Her Majesty the Queen, by himself, "or, under *his directions*, by his deputy, provided "that, except in the District Courts, no person "shall be so deputed to act on the trial of any "party charged with felony or misdemeanour, "unless he be of the degree of a Barrister-at-law "or Advocate, and of three years standing at the "Bar."

Whence it was urged by the Procureur General that his Deputy necessarily enjoyed the right of prosecution conferred upon the Procureur General, the first act towards which was the filing of an Information against all such offenders, and of signing the same. And further, in support of his second objection, that as the Procureur General is relieved from the necessity of any oath on filing a Criminal Information, so must his deputy be relieved from the necessity of any affirmation, contrarily to the decision of the District Magistrate.

In acknowledging the unequivocal right of the Procureur General of prosecuting offenders, by deputy, in the District Courts, the Magistrate, from the wording of Art. 1 of Ord. 29 of 1853, inferred that the only power which can be conferred to his Deputy, by the Procureur General, consists merely in his acting, on the *trial* of any offender, in lieu and stead of the Crown Prosecutor, (viz) the Procureur General.

And that assuming, however, the right on the part of the Deputy of the Procureur General, to sign and file a criminal Information, the latter should be laid upon affirmation (Art. 6 Ord. No. 35 of 1852, District Magistrates Ord: Criminal Side) which requisite does not appear on the face of the information filed in this case.

The District Magistrate made no answer to the argument of the Procureur General, and contented himself with leaving, for the consideration of the Court, the motin of the Procureur General.

JUDGMENT.

The power of prosecution is confided, by the criminal Procedure Ordinance, to the Procureur General, alone. He is the *only* Officer empowered by law to prosecute all offenders (Art. 1 of Ord: No 29 of 1853.) But as it is plain that the Procureur General could not be in attendance before the several Courts of the Island, on the same day, and perhaps at the same hour, it became necessary for the despatch of public business to provide against such an impossibility. Therefore it is that he is first provided with a Substitute Procureur General to assist him in the discharge of his duties before the Supreme Court, and other Courts of the Colony.

It became also necessary to provide against impossibility of the Substitute's attendance in the several Courts, at one and the same time. Hence it was provided by the Police Ord: No 11 of 1860, amongst other duties laid upon the Police force, that the latter "do exhibit Informa-

tions and conduct prosecutions for crimes, Misdemeanours and Contraventions, subject &a." (Art 21 No. 10) ; but every such information not being laid by the Crown Prosecutor (vizt :) the Procureur General, is to be laid upon affirmation. (Art 6 Ord. 35 of 1852.)

The Procureur General is further empowered by Art 1 of Ord. No. 29 of 1853 (Criminal Procedure Ordinance) to depute any fit and proper person to prosecute under his, the Procureur General's directions, all offences triable by and before the District Courts.

The Information laid before a Magistrate by the Deputy specially appointed by the Procureur General, whenever occasion may require,should be laid by the Deputy in the name of the Procureur General, to whom, alone, the right of prosecution has been confided by law. Such Information running in the name of the Procureur General who (by the bye) is a sworn Officer of the Crown, requires no affirmation on the part of the Deputy, because it is the Crown Prosecutor who by his deputy, and not the Deputy as such, who informs the Court of the offence complained of.

The deputy must, however, sign the Criminal Information, for the sake 1o. : of identifying himself with the Criminal Information laid by the Procureur General ; and 2ndly, for the purpose of establishing his identity with the individual alleged, in the body of the Criminal Information, to have been deputed by the Procureur General.

The better to elucidate our meaning, we shall refer to a Form given in the Original Draft of the Criminal Procedure Ordinance, by the late *Chief Judge Surtees*, not as law, but as a form which appears to us to meet the requirements of the law on this head.

" District of Mahebourg.—To wit : Be it remembered that the Honorable A. B, Procureur General of Our Sovereign the Queen, prosecuting, herein, in Her name and on Her behalf, by *E. F., Clerk of the Peace*, informs Her Court of General Sessions of the Peace, in and for the District of Mahebourg, that John Price of etc." The Information, says the note at the foot of the above form, should be signed by the Clerk of the Peace, instead of the Procureur General.

The Criminal Information, in this case, runs not in the name of the Procureur General by his Deputy, Greene, Acting Crown Solicitor, but in the name of the Deputy Greene, who informs the District Court that the offence therein mentioned has been committed. The Criminal Information is signed by the Deputy, not as such, but as Acting Crown Solicitor.

That Criminal Information we hold to be bad in law, because it should have been laid in the name of the Procureur General, who alone, has the right of prosecution, whether in person or by Deputy ; be the Deputy who he may be, and the Information should have been signed by the Deputy as such, with or without any further addition or additions.

SUPREME COURT.

—

ASSURANCES CONTRE L'INCENDIE,—INDEM CESSIONNAIRE,—EXPERTISE.

Le cessionnaire éventuel de l'indemnité stipu une Police d'Assurances contre l'Incendie, réclamer le paiement de cette indemnité l'accomplissement des formalités stipulées Statuts de la Compagnie d'Assurance et mément à ces Statuts.

Spécialement, le cessionnaire ne peut pours Compagnie, en paiement de la portion d'in qui lui a été transférée, tant que l'expertis nue dans les Statuts de la Police d'Assur pas eu lieu entre la Compagnie et l'assuré.

—

FIRE INSURANCE,—INDEMNITY,—ASSIGNE PRAISEMENT. (" EXPERTISE. ")

The Assignee of a portion of the indemnit lated in a Fire Insurance Policy, cann payment of such portion of indemnity, pre the fulfilment of the formalities enacte Statutes of the Policy, having taken pl otherwise than in execution of such statut

As a consequence, such assignee cannot Company, for the payment of the share o nity transferred to him, before the appr (expertise) provided for in the statutes Policy has taken place between the Insu the Company.

—

EMILE DIORÉ,—Plaintiff.

versus

THE MAURITIUS FIRE INSURA COMPANY,—Defe

—

Before :

The Hon. JUSTICE BESTEL.

—

L. ROUILLARD, —Of Counsel for Plai
C. GAUTRAY, —Plaintiff's Attorney.
HON. L. ARNAUD,—Of Counsel for Def
J. PIGNÉGUY, —Defendants' Attorn

—

28*th April*

The Plaintiff had lent a certain sum o to wit : $370, to one Judgaunauth, sec the mortgage of a real property situate at Bois," on the condition that the mortg insure the building existing on the land gaged.

The mortgageor, Judgaunauth, perfor

condition laid upon him and effected, on the 22nd June 1868, with "The Mauritius Fire Insurance Company," an Insurance for $1,200.

The Insured, on the 3rd September 1868, assigned his Policy of Insurance to Emile Dioré, the Plaintiff, in guarantee of the payment of the said sum of $370.

The assignment was noted by the Company, on the very day of the transfer (viz :) 3rd September 1868, as appears from the indorsation made by the Company, on the Policy of Insurance.

In the night of the 24th to the 25th November 1868, a fire broke out on the premises of Judgonauth, and burnt down a pavilion bearing No. 1 in the Policy of Insurance, and insured for the sum of $800, and damaging another pavilion bearing No. 2 in the same Policy, and insured for $200.

Notice of such fire was given to the Insurers, on the 26th November, one day after it had taken place, by Simonet, the Attorney of Judgonauth, who gave a similar notice to the Junior District Magistrate of Port Louis, who, at once, proceeded to enquire into the cause and extent of the fire.

Some time having elapsed without any settlement having been come to between the Insured and Insurers, Judgonauth empowered Emile Dioré to receive, direct from the Company, the sum above mentioned of $370 out of the amount of indemnity to which Judgonanth might be entitled.

The settlement of indemnity being still delayed, Dioré brought this action against "The Mauritius Fire Insurance Company," in payment of the sum total of $383 04c, both for the principal sum of $370 with the interest thereon at the rate of 9 o|o per annum, that is $13 04 from 3rd September to the 26th January 1869, without prejudice to any other interest hereafter to become due.

On the case being called for trial, L. ROUILLARD for Plaintiff, after opening the facts above mentioned, examined his witnesses with the view of establishing the loss alleged to have been sustained by the Plaintiff through the laches of the Company, which, though aware of the partial assigment of Judgonauth to Plaintiff, ever since the 3rd September 1868 and of the existence of the mischief done by the fire to the buildings insured ever since the 26th November following, had taken no step until after action brought for the final adjustment of the rights of parties. When the necessary steps were taken, the loss sustained by Judgonauth was ascertained in presence of Judgonauth without the presence of Plaintiff, to whom no Notice was given of any of the proceedings, who, however, as assignee of the Insured, had an interest in attending the expertise resorted to. The policy of Insurance, said Hon : L. ARNAUD, for the Company, clearly establishes the existence of a contract between Judgonauth and the Company.

The assignment is shewn by the endorsement on the Policy, to have come to the knowledge of the Company. But this assignment grafted upon the original contract, confers on the Plaintiff, as such assignee, no other rights than those appertaining to the assignor.

The assignment cannot affect the contract entered into between the original parties to the contract of assurance, the assessment of which must be made in the manner and at the time provided for by Art. 19 and 24 of the conditions of the Policy of Insurance by and between the Insurer and Insured.

The presence of the assignee of the whole or part of the indemnity can be of no assistance towards the ascertainment of the amount of loss sustained. Should he, however, apprehend any combination prejudiciable to his right between the Insured and Insurer, he had merely to intervene in the matter, for the protection of his rights.

The acceptance of the transfer, by the Company, is tantamount to an attachment in the hands of the Company which would be liable to the assignee were they to pay the amount assigned to the Insured, without a special authority to that effect from the assignee.

JUDGMENT.

The point raised in this case, is not without its difficulties, which, however, are more apparent than substantial. For, on looking at them more closely, those difficulties which lie merely at the surface, soon vanish away and leaves us inpresence of a stern reality which is any thing but favorable to the Plaintiff's action.

1st. The parties to the contract are the Insured and the Insurers.

Their right and liabilities are to be determined by the law they have laid down to themselves. The assignment of any portion of the Insurance money cannot alter the law so laid down between parties to that contract. The extent of the damages sustained, the mode and time of assessing those damages, of making good the latter, can only take place in the mode and at the time or times stated in the Policy of Insurance which is the law of parties. Nowhere is it stated in the Policy that in case of any assignment of the whole or part of the indemnity, the assignee shall be present or called upon, either by the Insured or Insurers, to attend the expertise which the original parties to the Insurance Contract have stipulated should take place in the manner and within the time mentioned in Art. 19 and 24 of the conditions of Insurance. Let us test this by the Jurisprudence of the French Courts. The only French text-book we have on terrestrial Insurance, is the work of POUGET. What does he say on such transfers? In volume 1, under Article "Paiment," pages 570 and 571, we read :

"Il existe une légére distinction entre la "*délégation* et le transport eventuel d'indemnité.

" La délégation est un acte parfaitement vala-
" ble, aux termes duquel l'assuré, après l'incen-
" die, délégue soit la totalité soit une partie de
" l'indemnité à laquelle il a droit ; dans ce cas et
" lorsque la délégation porte sur la *totalité* de
" l'indemnité, le *paiement* doit être fait *directe-*
" *ment* au créancier, et la quittance énonce en
" quelle qualité il agit ; mais, préalablement
" la compagnie doit avoir fait approuver le règle-
" ment du sinistre par, *l'assuré*, et obtenir dé-
" charge pour ce fait. Le transport éventuel
" d'indemnité est l'acte par lequel un débiteur
" cède à son créancier hypothécaire l'indemnité
" éventuelle à laquelle il pourrait avoir droit
" après l'incendie des immeubles hypothéqués.
" Ce transport confère les *mêmes droits* que la
" délégation, encore bien qu'il ait lieu avant l'in-
" cendie."

The same rule holds good as to a *partial* delegation of the indemnity ; under the head " Transport," Vol. 2, p.p. 949 et 950 of the same work, we read :

" Lorsque l'emprunteur délégue au prêteur
" l'indemnité qu'il a à recevoir de l'assureur, en
" cas d'incendie de l'immeuble hypothéqué, ce
" transport doit sortir son entier effet."

" Si le transport est primé par une opposition,
" il ne peut préjudicier aux droits antérieure-
" ment acquis.

" Le transport équivaut alors à une simple
" opposition."

In volume 1 Vo. " Paiement," p, 571, the writer says ;

" Si indépendamment des délégations, quelles
" soient pour tout ou partie de l'indemnité, il a été
" signifié des saisies arrêts, les agents (des maisons
" d'assurances) doivent, ainsi que nous l'avons dit
Vo. " Opposition," se garder de juger la question de préférence. Ils se borneront à demander le concours à la quittance, de tous les créanciers délégataires et opposants et celui de l'assuré, ou bien que celui-ci fournisse la main levée des saisies-arrêts pratiquées contre lui et la renonciation au bénéfice des significations de transport, auquel cas l'indemnité peut être payée à *l'assuré*, lui-même, et sur sa simple quittance, en y mentionnant les main-levées des oppositions ou les renonciations aux délégations ou aux transports."

The necessary inference from those quotations are that the assignee, the Plaintiff in this case, will be fully entitled, unless there exists some cause of preference on the part of any other creditor unknown to the Court, at present, to the sum claimed by him out of the amount of the indemnity, if any, which shall be found against " The Mauritius Fire Insurance Company," in conformity to the provisions of Arts. 19 and 24 of the Policy of Insuranee of the 22nd June 1868.

That the acceptance by " The Fire Insurance Company," of the assignment, is equivalent to an attachment which would make it obligatory on the company not to part with the indemnity in favor of the Insured, without previous deduction of the sum assigned, on pain o rendering themselves liable for the same to the assignee ; that there is no authority in the Colonial law, nor in the jurisprudence of the French Courts making it obligatory, either on the assurers or insured to call the assignee to be present at any of the steps required by the Policy of Insurance, for arriving at the settlement of the indemnity to which the Insured might be entitled.

But, of course, should the assignee, on becoming aware of the existence of the fire, deem it advisable for the better protection of his rights to intervene, I am not aware of any law prohibiting his interference in the settlement of the indemnity.

To this end a Notice to the Company would be sufficient to secure his object and to prevent any thing being done without his presence and to the prejudice of his lawful rights.

Whether the Colonial law or the jurisprudence of the French Courts be referred to, I must come to this conclusion that this action must be dismissed, unless the Plaintiff should elect to be non-suited.

Costs against Plaintiff.

BAIL COURT

SAISIE ARRÊT,—TIERS SAISI.

Le debiteur d'une créance, entre les mains duquel la dite créance a été saisie arrêtée, est néanmoins tenu de la payer au créancier, si dans les délais voulus par la loi la demande en validité de la dite saisie arrêt n'a pas été dénoncée.

ATTACHMENT TO MONEY,—GARNISHEE.

The debtor between whose hands the debt has been attached, is, nevertheless, bound to pay the same if the demand in validity of such attachment has not been notified to him within the delays prescribed by law.

F. RICHER,—Plaintiff,

versus

GOLAM HOSSEN MAMODE,—Defendant.

Before :

The Honorable Mr. JUSTICE BESTEL.

L. ROUILLARD,—Of Counsel for Plaintiff.
E. DE CHAZAL,—Plaintiff's Attorney.
W. NEWTON, —Of Counsel for Defendant.
W. FINNISS, —Defendant's Attorney.

—

29th April 1869.

The Defendant had received goods by the vessel *Legion of Honor*, Williams master; he had paid 2/3ds of the freights due to the owners in the person of Richer, the Plaintiff, as Consignee and Agent of the owners, and as such entitled, as admitted by the Defendants, to recover such freight, when one Mahomed Hassen *alias* Mallam Hassen, on the 20th January last, attached, in Defendants' hands, all sums of money and other property whatsoever which the Defendant, in this case, owed or might owe on whatever account to P. William, master of the said vessel, and especially the sum due by the Defendants for the freight of divers merchandizes shipped on board of the said vessel, to secure payment of the value and damage due and suffered by the attaching party, for the non-delivery of one case of iron spoons shipped on board of the said vessel consigned to him the attaching party.

This attachment was brought to the notice of the Plaintiff by Defendant who, at the same time, expressed his readiness to pay the balance remaining due upon the freight, on renewal of the said attachment.

The validity of that attachment was not applied for by the attaching party, nor any notice served upon the Garnishee, within the time required by Article 565 C. P. C.

The attachment being of the 20th January, should have been validated, at the latest, on 31st January. No such demand was ever made and still less served upon the Garnishee.

And yet altho' served with the Plaintiff, on 4th February last, calling upon him for the payment of the balance of freight due by him, the Defendant thought fit to deposit the balance claimed into Court on the 12th February last, and now seeks to be relieved from payment of any interest and from the costs of this action, on the ground that he was not, nor, could he be a judge of the validity of the attachment put into his hands by the attaching party, whether rightly or wrongly.

Assuming him to be no judge of the merits of the attachment, yet the time for the validation of that attachment having expired before he was legally called upon to pay to the Plaintiff the amount attached in his hands, it was his bounden duty to have paid the money demanded of him, especially the time for validating the attachment having expired, and that up to this day, no denunciation of the demand in validity has been served upon.

This he might safely have done, as "Faute de dénonciation de la demande en validité, au tiers saisi, les paiements par lui faits jusqu'à la dénonciation seront valables. (Art. 565 C. P. C.)

Judgment will, therefore, be entered for Plaintiff, with interest at 12, from the service of the Plaint, with costs, arrest in execution, three years imprisonment.

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SUPREME COURT.

—

DIVORCE,—ADULTÈRE,—DÉSAVEU D'ENFANT.

—

DIVORCE,—ADULTERY,—DISAVOWAL OF A CHILD.

—

R. THE HUSBAND,—Plaintiff,

versus

R. THE WIFE,—Defendant.

—

Before:

His Honor the CHIEF JUDGE and
His Honor Mr. JUSTICE BESTEL.

—

THE HON. V. NAZ,—Of Counsel for Plaintiff.
J. PIGNEGUY, —Plaintiff's Attorney.

—

29th April 1869.

This was an action for a Divorce *à vinculo matrimonii*, on the ground of Adultery committed by the Defendant during the temporary absence of her husband, the Plaintiff, from the Island.

On his return to the colony, the Plaintiff introduced into this Court, an action in disavowal of the male child to which the Defendant had given birth on or about the 25th day of May in the year 1867.

On that action, the Plaintiff succeeded, and by a Judgment of this Court, of the 5th May 1868, the said male child was declared not to be the issue of the legitimate marriage of the Plaintiff with his wife, the Defendant.

The Plaintiff having thus proved his case and established the Adultery which is the ground of the Divorce now prayed for; the Court, with the concurrence of the "Ministère public," is driven to the necessity of dissolving the marriage bond, wherein parties were respectively holden, and the Plaintiff is hereby authorized, on compliance with the requisites of the law in matters of Divorce, to summon the Defendant before the Officer of the Civil Status, who is hereby empowered to pronounce the Divorce hereby allowed.

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SUPREME COURT.

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SOCIÉTÉ CIVILE,—ARBITRAGE.

Dans un acte de société civile, les parties peuvent convenir que certaines contestations qui pourront s'élever entre les associés seront soumises au Jugement d'arbitres choisis par les associés; mais cette clause ne sera valable qu'à la condition de spécifier d'une manière précise les questions qui devront être soumises aux arbitres et de nommer les arbitres.

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CIVIL PARTNERSHIP,—ARBITRATORS.

The parties to a deed of Civil partnership may agree that certain contestations which may arise between the partners shall be submitted to arbitrators appointed by the said partners; but such clause will be lawful under the condition of sufficiently specifying the subject matter to be referred to arbitration and of naming the Arbitrators.

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GALDEMAR FRÈRES,—Plaintiffs,

versus

WIDOW DIORÉ AND ORS,—Defendants.

—

Before:

His Honor Mr JUSTICE BESTEL, and
His Honor Mr JUSTICE COLIN.

—

P. L. CHASTELLIER,—Of Counsel for Plaintiffs.
F. VICTOR, —Plaintiffs' Attorney.
E. PELLERÉAU, —Of Counsel for Wid. Dioré.
J. MERCIER, —Attorney for same.
A. LEGALL, —Of Counsel for J. J. Wilson.
J. PIGNÉGUY, —Attorney for same.

—

29*th April* 1869.

The Plaintiffs in this case, seek to obtain from the Court, an Order for the dissolution of a Civil Partnership entered into on the 28th October 1867, by the Plaintiffs and the Defendants, for the purpose of working the Sugar Estate *Richfund*, situate at "La Brisée Verdière" in the District of Flacq. The Declaration sets forth the grounds upon which the Plaintiffs rest their case, grounds into which, for the purpose of the point raised by the first Plea, it is now immaterial to inquire. One of the Defendants, the Widow Pierre Dioré, pleaded as a first plea, that, "the deed of Partnership entered into between parties and mentioned in the Plaintiffs' Declaration, stating that all the difficulties or contestations which might arise between the partners, shall be submitted to the final Judgment of two arbitrators appointed by the said partners, and stipulating that in default of the partners to appoint such arbitrators, the said arbitrators shall be appointed by Justice to whom the faculty is left of naming a third arbitrator to divide them, if necessary; the Plaintiffs are debarred by the aforesa from the right of entering any action for solution of the said Partnership before preme Court, and ought to be referre arbitrators appointed by the partners o tice, to decide upon the contestations a tween parties.

The other Defendant, Julius Josephus did not join in the aforesaid plea.

The Plaintiffs contended that the pl jurisdiction of the Court, was untenable grounds: 1o. because parties could not as to oust the jurisdiction of the Court; cause the reference did not and should ha the names of the intended arbitrators; cause supposing the reference valid, it applied to the discussions that might tween parties, and did not touch the exi the partnership, the essential question it should be ordered to determine, or to

The clause in the contract upon whi the plea, of which the plea is but the e thus:

"Toutes questions relatives aux aff
" la société, seront décidées à la majo
" voix des associés, et enfin, toutes diffi
" contestations qui pourront s'élever e
" associés, seront soumises au Jugement
" nier ressort, de deux arbitres choisis
" dits associés. Faute par ces derniers
" sir ces arbitres ils seront nommés par
" avec faculté à eux de s'adjoindre un
" bitre pour les départager, s'il y a lieu."

In the very able argument laid befo both sides on the first point urged ag validity of the clause of reference, we we struck with the great divergence of opini upon this *questio vexata*, has arrayed learning and weight of authority on eith If PARDESSUS, No. 1391, CARRÉ 9. 3 many other commentators and Courts the validity of the clause, MERLIN (*Q. d* THOMINE DESMAZURES and other no less commentators and learned Courts are ir of the contrary doctrine. It is a rule that Courts of Justice will construe th tion of parties, so as to give effect to the lations, provided these be not prohibited But can parties covenant that their fu putes shall be so dealt with, that one shall be deprived of the power of resor Court of law to enforce his rights or to medy for his wrongs?

Upon this question of doctrine which one of universal application, not limited special laws of one country, we were ref the law of England as an illustration re more easy the solution of the whole subj England, likewise, the question has give a good deal of discussion. Until the im case of *Scott* v *Avery* (House of Lor Law J Rep. N. S. Exch. 38) it was clear that the agreement to refer v binding, so far as it could oust the juri of the Courts. Since that case was the Court of Exchequer in *Horton* v *Sa*

Law J. Rep. N. S. Exch. 28) has upheld the principle that the clause was not binding which absolutely ousted the Judgment of the Court, distinguishing that general principle from the special facts in *Scott* v *Avery*, where the jurisdiction of the Court was not absolutely ousted, but a condition precedent to the right of action had been covenanted for, that is, that before action could be brought the damages should be ascertained by an arbitrator.In another case *Scott* v *The Corporation of Liverpool*, (28 Law J. Rep. N. S. Chanc. 2. 30), the Lord Chancellor affirming the decision of *Stuart* v. c. and the opinion of Erle, J., held " that the parties to the agreement have provided before hand for the settlement of any disputes that may arise on the rights and liabilities growing out of the contract, by the arbitration of persons mentioned in the agreement, or to be determined when disputes arise. Such a stipulation cannot be urged as an answer to either party who prefers to resort to the Courts for the determination of his rights, nor can it deprive the tribunals of the country of their jurisdiction, whatever remedy may be open to the parties against whom proceedings are instituted for the breach of the agreement. But when the contract provides for the determination of the claims and liabilities of the contractors by the Judgment of some particular person, this would be incorrectly called a provision for submission to arbitration, as no dispute can exist in such a case, everything being dependent on the decision of the individual named ; and until he has spoken, no right can arise which can be enforced either at law or in equity." The rule here laid down seems to embody the principles held in *Scott* v. *Avery* and *Horton* v. *Sayer*.

In *Préaudet* v. *Mariette and ors* * in a case very similar to this, a case of civil Partnership, in which the Plaintiffs sought, as the Plaintiffs in this case seek, to obtain the annullation of the co-partnery in which the plea was as the plea here is, that the matter should be referred to arbitrators, according to a covenant to that effect ; this Court has had occasion to declare an agreement of this nature to be lawful, whilst holding at the same time that the subject matter of the Plaintiff's prayer, in that special cause, was not connected with the Partnership. This case would, therefore, whilst upholding the abstract rule on which the plea rests, be fatal to the plea on the second objection taken by the Plaintiffs.

But it is often difficult to know precisely whether a particular issue is covered by the very general but vague terms of a covenant to refer long before disputes have or can have arisen.

There is another point, not taken in *Préaudet* v. *Mariette*, which seems to us to be very conclusive.

Art : 1006 of the Code of Civil Procedure enacts, under pain of nullity, that the reference shall give the names of the Arbitrators. In the contract before us, the names of the intended arbitrators are not to be found, and one of the parties declines going before arbitrators. It is urged that the Court may appoint the arbitrators now. The answer lies on the surface. Why should the Court, without consent, supply a fatal omission ? Either the reference as it stands is sufficient or it is not. If it is, we have no power to add conditions, to supply omissions ; if it is not, why should we interfere to make it sufficient so as to oust our jurisdiction.

It would be a reference not on account of a previous binding agreement, but on account of an invalid agreement, made binding by the intervention of the Court. We think there is a good deal in what Mr. Baron Bramwell stated in his Judgment in *Hurton* v. *Sayer*, that " it is quite clear that the parties might, if they had thought fit, have so framed the covenant, that until there was an arbitration, there should be no cause of action." And so they may in our law, provided the conditions of such a contract be found in the contract, a subject matter referred, and an arbitrator named. It was argued as usual, that this was not a reference, but a promise to refer ; we give no opinion as to the right of any party to obtain damages for breach of covenant, (Art. 1142 C. C. Vide also *Livingston* v. *Ralli* 24 Law J. Rep, N. S. Q. B. 69 ; but we find no distinction between a promise to refer and any other promise, the promise to sell, for instance (Art. 1589 Code Civil). To be binding, the promise to refer should contain the essential requisites of a reference, as the promise to sell, to be binding, should contain the essential requisites of a contract of sale.

The Cour de Cassation (*L'Alliance* v. *Prunier* S. V. 43-1-561) deciding in case of policy of insurance containing an agreement to refer, but without naming the arbitrator, has held upon a plea similar to the one before us, that the clause was of no effect in terms of Art. 1006 and that if one of the parties refused to go before arbitrators, such party was not debarred by an invalid covenant like this, from enforcing its rights before the ordinary Courts. That Decision affirmed the Judgment of the Court of Appeal of Lyons (S. V. 41, 2, 341).

Since the Judgment of the Court of Lyons, the Court of Paris, (in *Pruneaux* v *Lesselin* S. V. 43-2. 6) has held the same doctrine which has since been also adopted in (*Cadot* v *Hespel* S.V. 43, 2, 489) by the Court of Douai which had previously, in 1837, decided the other way. It is to be noticed that the same volume of Reports gives a Decision of the Court of Agen taking a different view, but that Decision was prior to the Judgment of the Supreme Court of France.

On the whole, such covenants are not prohibited by our law, and are lawful. But they are lawful under the condition of sufficiently specifying the subject matter to be referred to arbitration, and of naming the arbitrators. We have seen that this contract did not name the arbitrators. We say nothing as to the sufficiency of the reference so far as the subject matter is concerned. We can take very little notice of the argument drawn from expediency ; the law seems to us positive and the objection is before us. A reference may not be, in certain cases, a speedy and economical mode of settling disputes ; and

* Suprâ—vce 1. Page 179.

yet our experience of references has, by no means, made us enthusiastic of such 'domestic tribunals', and we might easily refer to cases where litigation has, through references, been protracted far beyond the time that the trial would have occupied before the Court, and where economy has been quite out of the question.

In Commercial Partnerships, disputes between partners were, by our law, (Art, 51 CODE COM.) ordered to be referred; that Article has been repealed by a special Ordinance. When parties are inclined to go to arbitration, we are ready to assist them as best we may; but in a matter of doubtful expediency, when one of the parties insists upon proceeding to trial, and the agreement to refer is, as we hold it to be, in this case, not binding, we ought not to interfere.

The Plea must be overruled with costs against the Defendant, Mrs Widow Pierre Dioré.

The parties will proceed on the merits of the case, without delay.

BAIL COURT.

PREUVE TESTIMONIALE,—APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT.

La preuve testimoniale est admissible dans tous les cas, en matière de commerce.

EVIDENCE,—ORAL PROOF,—COMMERCIAL MATTERS,—APPEAL FROM THE JUDGMENT OF A DISTRICT MAGISTRATE.

Oral proof is admissible in all Commercial matters.

ARMOOGAPILLAY & ANOTHER,—Appellants,

versus

VYDELINGAPILLAY,—Respondent.

Before:

The Honorable NICHOLAS GUSTAVE BESTEL.

G. GUIBERT,—Of Counsel for Appellants.
J. MERCIER,—Attorney for same.
V. NAZ, —Of Counsel for Respondent.
H. BERTIN, —Attorney for same.

29th April 1869.

The Action tried in the District Court, had, for its object, the recovery of the balance of a sum due for goods sold and delivered by the Appellants, traders at "Souillac," District of Savanne, and for money lent by the same to the Respondent.

The point raised on appeal is fully set out in the Judgment given between parties. Whereas, says the Judgment, though the exception to art. 1341 C.C. contained in art. 109, of the C. of Commerce, as regards "Achats et Ventes," has generally been extended by the Commercial Jurisprudence to other transactions between traders, it has been always under the provision of the last paragraph of the said art. 109, vizt. "dans le cas "où le tribunal croira devoir admettre la Preuve "testimoniale." Here follow the authorities quoted by the Magistrate in support of the opinion just expressed by him for using such discretionary power. The Judges must be very cautious not to endanger the rights and interests of parties by admitting or refusing to admit so dangerous a kind of evidence. In this colony, especially, where false testimony is of daily occurrence. The Courts must be more prudent in extending an exception to the General rule of our Law: art. 1341 C.C.

The Magistrate proceeds in setting forth his other grounds for the disallowance of the parole evidence prayed for.

The only ground urged for reversing the ruling of the Magistrate is that "the Magistrate had rejected and declined to admit the oral testimony tendered by the Appellants, in support of Plaintiff's claim altho' grounded on transactions made between traders and for use of Respondent's trade.

JUDGMENT.

On reference to the law and the legal authorities on this point, I find that the last Par. of Article 109 of the Com. Code, leaves it to the discretion of the Judge or Magistrate to admit or reject such Parole Evidence. "Les Achats et Ventes," says Art. 109 C. Com. "se constatent: 4o. par la preuve testimoniale, dans *le cas ou le tribunal croira devoir l'admettre.*"

In order that I should reverse the Judgment appealed from, I must find that the Magistrate has abused of the discretion vested in him. I have carefully looked into the reasons stated by him for having refused the oral evidence tendered. He is probably correct in stating that no less than 160 articles are sought to be proved by parole, between parties who, knowing how to write, were inexcusable for not having claimed, if not a bon or promissory note, should at least, have insisted upon a demand by letter, especially when sums of £200 are stated to have been lent at one time. Is it to be admitted, continues the Magistrate, that the Plaintiffs (now Appellants) giving money to the amount of £152 to a stranger for the Defendant (now Respondent), would not have asked for an acknowledgment thereof, from that stranger, as a voucher. Is it easily admissible that Defendant (now Respondent) for avoiding payment of a balance of $187, should deny having paid so large a sum of £571; and, again, that a cheque drawn on so Honorable a Firm as "*The Ceylon Company*" whose books are regularly kept, could not have been procured as evidence.

The reasons set out by the Magistrate, in sup-

port of his disallowance of the proof sought to be adduced appear to me insufficient to warrant the conclusion arrived at by him.

The rule which has prevailed in this Court, for nearly 30 years, has been and still is that which has been sanctioned not only by the French text-writers but by the jurisprudence of the French Courts of Law, affirmed as it has been by the "Cour de Cassation," (vizt) : la preuve testimoniale est admissible, dans *tous les cas, en matière de Commerce* : les prohibitions de la loi Civile sont inapplicables, *sauf bien entendu*, les cas où le législateur *exige un Acte écrit.* (Art. 1341 C. C. GILBERT, Note 56, and the authorities therein mentioned.) The reasons for allowance of Oral Evidence in Commercial matters are fully set out in TOULLIER, Vol. 9, No. 230 and pages 357—372.

"En matière commerciale, says CARRÉ AND CHAUVEAU, "aucune limite n'est fixée aux juges "pour l'admission de la preuve testimoniale. Dans "les affaires qui se succèdent aussi rapidement "que les négociations commerciales, on n'a pas "toujours le loisir et le pouvoir de prendre d'u-"tiles précautions pour constater les engage-"ments. Il était donc nécessaire que la loi se "montrât plus facile sur les moyens de preuve."

POTHIER enseignait déjà, sous l'ancien droit, cette doctrine qu'aujourd'hui tous les auteurs embrassent et que nous trouvons sanctionnée par les arrêts— (see CARRÉ AND CHAUVEAU, *Proc. Civile*, Vol : 3. Quest : 1539 ter : .)

Should the parole evidence be attempted to be given of other matters than Commercial Transactions, it will, of course, be the duty of the Magistrate to check the attempt, as it will be his duty, after hearing the witnesses, to weigh their various depositions and to determine the degree of credit to be attached to such depositions, whether in whole or in part, and to give Judgment, accordingly.

Under these circumstances, I shall and do reverse the Judgment, in so far as it has refused the parole evidence tendered, and shall, and do hereby, refer the record back to the District Court for the purpose of enabling the Magistrate to proceed with the hearing of the witnesses produced or to be produced by the parties to the suit. Costs reserved.

BANKRUPTCY COURT.

FAILLITE,—ABSENCE DE LIVRES,—CERTIFICAT.

BANKRUPTCY,— WORTHLESS BOOKS,— CERTIFICATE.

BANKRUPTCY ALFRED VERRON.

Before

His Honor Sir CHARLES FARQUHAR SHAND, Chief Judge.

EUG. BAZIRE, —Of Counsel for the Bankrupt.
F. VICTOR, —Attorney for same.
L. ROUILLARD, —Of Counsel for the Assignees
P. E. DE CHAZAL,—Attorney for same.

10th May 1869,

In this case, the Court has now to deal with the question of the Bankrupt's discharge. The Official Assignee has considered it his duty, in the circumstances, to oppose the issuing of a certificate. It appears, from the evidence, that the Bankrupt began business as a Linen-draper in Port Louis, in the year 1853, and continued to carry on that trade till his stoppage of payments some months ago. His debts, according to his Balance-Sheet, amount to £11,455.42, and his assets to $2,523 88. He ascribes his losses, in the first place, to an alleged larceny in 1864 of £6000 from a press in his house; 2dly. to the heavy discounts which he had to pay in his business; the loss thereby incurred he estimates at £2,303 odds; lastly to the great depreciation in the value of shop goods during the late difficult times of the Colony.

It has been shewn, in evidence, that the Books of the Bankrupt have been so badly kept that they do not shew the position of his affairs. Indeed, to use, the words of one of the witnesses an experienced man of business, the information they offered is so defective that they are practically "worthless."

There is, however, a difficulty in dealing strictly with the Bankrupt, in relation to this part of the case.

It appears that he is a man of no education; he cannot read and cannot write beyond rudely forming some figures and signing his name. His business books, if those records may be thought worthy of the name, were made up by a person employed by the Bankrupt, from rough jottings and scraps of figures supplied by the latter.

With regard to a very important statement of the Bankrupt, viz : the alleged loss by theft, from his dwelling house of the large sum of £6000, the Court is very far from being satisfied with the account given by the Bankrupt. No one has been adduced as a witness who can confirm the statement of the Bankrupt, that he was actually in possession of such a sum of money, altho' on the other hand, it would, no doubt, appear that at the outset of his career as a trader, he was the owner of considerable funds. It is true that the Bankrupt, at the time of the alleged abstraction of his money, lodged information with the Police, and called in his neighbours, complaining of his house having been broken open in his absence, and shewing them the disordered state of the part of the premises where he says the money was kept.

But all this, it need scarcely be said, goes only a very short way to establish the loss of the money. Again the pressure of the terms on which he did business with the houses that supplied him with goods, cannot be reasonably complained of; for those terms were not different from the

rates usually prevailing in the trade of the Colony. As to the late depreciation of his property, no doubt the value of such wares as he dealt in must, latterly, have been much diminished in Port Louis ; but, an unfavorable feature in the case, here presents itself. The Bankrupt, it is true, denies the accuracy of the statement ; but it has been given in evidence before the Court, that he undertook to one of his leading creditors, not to sell his goods at any considerable abatement ; a promise which he did not keep.

Altogether, it is plain that the case is a special one ; and having features not commonly occurring in inquiries of this nature, I am of opinion that the account given by the Bankrupt, of his losses, is not satisfactory, and that, in the circumstances, no certificate of any class can, at once, be granted.

A Certificate of the 3rd class will be allowed, but not to be issued for 6 months from this date, during which period, Protection is withdrawn.

SUPREME COURT.*

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LICITATION,—DÉLAI,—NULLITÉ,—DEMANDE EN SUBROGATION.

Lorsque la demande en licitation n'est pas suivie, dans les quinze jours, du dépôt du Cahier des charges, cette demande n'est pas nulle et les Défendeurs ne peuvent faire une nouvelle demande à leur requête ; ils doivent simplement se faire subroger dans la demande déjà faite.

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LICITATION,—DELAY,—NULLITY,—SUBROGATION

Where the Petition to the Master, for a Licitation, has not been followed up, as prescribed by law, by the deposit of the memorandum of charges, the Petition is not annulled and the Defendants are not entitled to file a new Petition and to have, thereby, the carriage of the proceedings ; they are only entitled to pray for subrogation into the rights conferred by the first Petition.

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LADOUCEUR & ANOR,—Appellants,

versus

BASTIEN AND WIFE,—Respondents,

—

Before :

His Honor Justice BESTEL, and
His Honor Justice COLIN.

—

G. GUIBERT, —Of Counsel for Appellants.
P. E. DE CHAZAL,—Appellants' Attorney.

L. ROUILLARD, —Of Counsel for Respo
A. PISTON, —Respondents' Attorne

—

11*th May* 1

This was an Appeal against a Decision Master, under date 16th March 1869, w Bastien the wife obtained the right to ca proceedings for a sale by Licitation, in pre to the Appellants.

The case seems to us a very plain one 97 of Ord. 19 of 1868 enacts that : when conflicting demands for a sale by Licitatio been made, preference shall be given to th whose Petition has been presented first.

It is incumbent upon such party to fol his demand by filing in the Master's office, a fortnight after the demand has been dep the memorandum of the conditions of the Licitation intended to be carried on.

It is in no wise enacted that this shall b under pain of nullity, or that the party fai file such conditions of sale within the fo shall, *ipso facto*, lose his right to carry on t ceedings.

Cases of negligence may occur in whi Master might possibly be called upon to in by granting subrogation into the proceedi another party in lieu of the privileged bu gent party ; but such a case has not arise and when it does arise, a practical remedy practical grievance will easily be found s plied by the officer of the Court.

But, as a matter of fact, the Respo were the first to petition ; it follows tha have the right to carry on the sale.

They do not lose that right simply by failed to deposit the conditions of sale wi fortnight.

No fact of gross or wilful negligence w before the Master, calling for his special ference ; no demand in subrogation was l fore him.

Under the special facts of this cause, the lants, when they came into the field, did is urged, know that the Respondents had obtained that which they sought to obtai right to sell the property in question, by tion. It is not necessary to consider wheth might have known this if they had cho know it. The Master has been satisfied t Appellants' costs before him should be c Licitation. Against that Order there is no but we are of opinion that, having obtain a Decision, the Appellants ought not to h tered this appeal. We fully agree with th ter, on the merits of this cause ; we confi Decision, but are of opinion that the costs this Court should be paid by the Appellan

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SUPREME COURT.

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SOCIÉTÉ, — CONTESTATIONS ENTRE ASSOCIÉS,— RAPPORT DU MASTER,—APPEL.

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PARTNERSHIP,—CONTESTATIONS BETWEEN PARTNERS,—REPORT OF THE MASTER APPEALED FROM.

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BRÉARD,—Appellant,

versus

HEWETSON,—Respondent.

—

Before :

His Honor JUSTICE BESTEL and
His Honor JUSTICE COLIN.

—

L. ROUILLARD,—Of Counsel for Appellant.
E. DUCRAY, —Appellant's Attorney.
HON. V. NAZ,—Of Counsel for Respondent.
H. BERTIN, —Respondent's Attorney.

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11*th May* 1869.

This was an Appeal from a Decision of the Master, upon a Rule of reference by consent, from this Court to the Master, ordering "that "the whole matter (at issue) between parties be "referred to the Master of this Court, to "compute accounts and decide, if necessary, "upon the validity or existence of the alleged "sale by Bréard to Hewetson. All rights of "Bréard to object to the said alleged sale being "proved, and all the rights of Hewetson to "prove such alleged sale, being duly reserved."

Parties and witnesses heard on the 29th July 1868, the Master went thro' the various heads of the demand of Bréard v. Hewetson and found that the first head of Bréard's demand rested upon an account drawn up from the books of the Albion Dock, which did not and could not, for the reasons by him set forth, shew the accurate state of the concerns of that establishment, and decided that the incomplete and incorrect statement produced by Bréard could not be taken as a basis for any action before a Court of Justice, against Hewetson.

As regarded the 2nd head of the demand relative to the alleged use and enjoyment, by Hewetson, of the mules &c., and other articles composing the stock of materials of the establishment, after the cessation of the operation in the demand mentioned, the Master decided that in the absence of any "*mise en demeure*" of Hewetson, to fulfill his obligation, Hewetson was not bound to pay any sum to Bréard, either for the alleged use and enjoyment of the said stock of materials, or as damages for having kept and retained the same.

With respect to the 3rd head of the demand of Bréard, the Master decided that Hewetson having failed to prove the alleged sale of the said stock of materials by Bréard to him, for the sum of $1200, was bound to return the same to Bréard, in terms of the agreement entered into between them, but only such as it might then stand, or rather such as it stood at the date of the demand, as there had been no previous "*mise en demeure*" and because, pursuant to the agreement between parties, Hewetson was not responsible for the mortality of the animals, nor was he obliged to replace the carts and other articles worn out or distroyed, and further, subject to the previous payment by Bréard of any sum that might be due to Hewetson for the advances made by him, with interest at 12 o|o from the 10th August 1864, date of the end of the operation, amounting to the principal sum of $1026, 20 c.

Several objections were filed by Bréard against the various Decisions come to by the Master, on the several heads above referred to of his demand. Those several objections were overruled and the Master, on the 14th Dec. last, maintained his Report such as it was originally drawn up.

JUDGMENT.

It now remains that the Court do express an opinion on the worth of the Master's Report on the various heads of demand laid before him.

After carefully weighing the reasons assigned by the Master in support of his conclusion on each of those heads ; we fixed no reason for departing from the ruling of the Master on the several heads dealt with by him in his Report. We therefore, affirm the Master's Report, with costs against Bréard.

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SUPREME COURT.

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RÉSOLUTION DE VENTE,—DOMMAGES,—ACOMPTES.

Le vendeur qui a reçu paiement d'une partie de son prix et qui demande résolution de la vente pour défaut de paiement du solde lui restant dû, ne peut reprendre sa propriété qu'en restituant à l'acquéreur la portion du prix de vente payée par ce dernier. Si, par la faute de l'acquéreur, l'immeuble vendu a subi une détérioration équivalante à la portion du prix de vente qu'il a payé, le vendeur aura le droit, alors, de retenir cette portion du prix de vente, à titre de dommages et intérets.

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SALE,— ACTION IN CANCELLATION THEREOF,— PART PAYMENTS.

The vendor who has received part payments out of his sale price, and who claims cancellation of such sale, for want of payment of the balance due, cannot resume the ownership of his said property without paying back to the purchaser the portion of the sale price already paid by the latter. Where, by the purchaser's fault, the property sold has de-

creased in value to the amount of the part payments, the vendor shall then be entitled to keep the same as damages.

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E. DE CHAUMONT,—Plaintiff,

Versus

N. BIGAIGNON AND ORS,—Defendants.

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Before:

The Hon. JUSTICE BESTEL and,
The Hon. JUSTICE COLIN.

—

E. PELLEREAU,—Of Counsel for Plaintiff.
J. MERCIER, —Plaintiff's Attorney.
E. J. LECLZIO,—Of Counsel for Mooning & wife.
A. J. COLIN, —Attorney for same.
W. FINNISS, —Attorney for Bigaignon.

—

11*th May* 1869.

By a notarial deed, dated May 2nd 1866, Deschiens and wife and Moonings and wife sold, to the late Amanda Bigaignon, the deceased wife of James Arnot, a plot of ground situate at Moka, of about 20 acres in extent, for the sum of $2,700.

It appears that, out of the sale price, the sum of 1,000 was paid.

It appears, also, that the Plaintiff now holds the rights of Deschiens in and over the balance still unpaid, and is, therefore, the creditor of the sum of $850, with interest at 9 o|o since the 2nd May 1868, which sum of $850 the Defendant who is sole heiress of the late Mrs Arnot, née Bigaignon, has neglected to pay.

The Plaintiff has, accordingly, brought an action, to which, Moonings and wife creditors for the moiety of the sale price still unpaid, have been made parties, to obtain: 1o. The cancellation of the sale aforesaid, 2o. an Order to the effect that the sum of $1000 paid by Mrs James Arnot, should not be paid back but kept by the vendors, as damages, on account of the destruction, by the purchaser, of the wood growing upon the Estate.

Moonings and wife, made Defendants to this action, but having practically the same interest as the Plaintiff, pleaded that they had no objection to the prayer in the Declaration set forth.

The real Defendant, by Wm. Finniss, her attorney, pleaded several pleas, in support of which not the slightest evidence was offered; but pleaded also as to the second ground of action, that far from decreasing, the Defendant had increased the value of the land, by planting the whole of it with sugar canes.

JUDGMENT.

We think the Plaintiff entitled to the cancellation of sale payed for; he is a creditor on account of a sale price left unpaid, and the remedy applied for by him, is one which may be and is here legally sought.

But the effect of a cancellation of sale, is to place the parties to the sale, or their assigns, in exactly the same position as they were before the sale; the vendor may not recover the whole estate back through the annullation of the contract, and keep that portion of the sale price which he has received on account.

The vendor may, certainly, set-off against the purchaser's claim for repayment, any sum due to him for damages suffered on account of the non execution of the contract, as for instance, for any deterioration of the property sold.

He ought not, without full compensation, to receive a ruined Estate instead of a prosperous Estate. It is incumbent upon him, however, to prove the specific damage suffered; to prove that the value of the property has decreased.

The Plaintiff well aware of this, has alleged that the Defendant had cut down timber and, thereby, lessened the value of the land.

Witnesses were called to substantiate that allegation; but the evidence failed completely to prove that the Plaintiff would recover back an Estate of less value than it really had, at the time of the contract.

The witnesses distinctly prove, on the contrary, that the land is now of much greater value; if some trees have been cut down and fire wood made, the land has been cleared, worked, planted and there are sugar canes now actually growing upon it.

The claim for damages fails, then, entirely; and there is no other fact alleged to take this case out of the sound general rule: that if the contract of sale is cancelled and the vendor takes back his property free from all charges and encumbrances laid thereon by or on account of the purchaser, he should, on the other hand, refund the portion of the purchase price he has received on account.

Judgment will be entered for the Plaintiff, cancelling, as prayed for, the sale of the plot of ground in question in favour of him the Plaintiff and Moonings and wife; but the sum of $ 1.000 received in part payment of the purchase price must be paid back to Defendant or assigns. Costs in favor of the Plaintiff, so far as the action in cancellation of sale is concerned; but all costs, such as witnesses, &a., incurred on account of the claim for damages, to be paid by Plaintiff, himself.

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BAIL COURT.

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DOMMAGES ET INTÉRÊTS—MISE EN DEMEURE,—PROPRIÉTAIRE ET LOCATAIRE,—BAIL.

Le locataire qui a éprouvé des pertes par suite de défaut de réparations faites en temps utile à la maison louée, ne peut réclamer du propriétaire, des dommages et intérêts, si ce dernier n'a point été mis en demeure de faire les réparations requises, avant l'époque du dommage.

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DAMAGES — " MISE EN DEMEURE,"—LANDLORD AND TENANT,—LEASE.

The tenant who has experienced losses in consequence of the want of repairs made in due time to the house let, has no right to sue the landlord in payment of damages if, previous to the occurrence of such losses, he has not summoned the landlord to make the necessary repairs.

—

TANKOE,—Plaintiff

versus

GUSTAVE OVIDE,—Defendant.

—

Before :

His Honor JUSTICE COLIN.

V. DELAFAYE,—Of Counsel for Plaintiff,
E. SAUZIER, —Plaintiff's Attorney,
G. GUIBERT, —Of Counsel for Defendant,
A. BÉTUEL, —Defendant's Attorney.

—

11*th May* 1869.

This was an action for damages, brought by the Plaintiff against the Defendant, his landlord, for loss incurred by the Plaintiff through the Defendant's neglect to repair the premises occupied by the Plaintiff, and by him used as a store.

The damages were laid at £100, and it was further asked of the Court that its Judgment be enforced by the caption and imprisonment of the Defendant's body.

After V. DELAFAYE had opened his case, he called a witness to prove the facts alleged ; but G. GUIBERT, for the Defendant, objected that there had been no " mise en demeure " and that the action in damages was not admissible. He cited Art. 1146 CODE CIVIL.

Delafaye replied that he was not prepared to show a " mise en demeure " served by the Plaintiff or at his request, but that he could prove that the Defendant knew that the repairs required of him were necessary, and had sent workmen who had begun the repairs, but left them off unfinished.

JUDGMENT.

The Art. 1,146 Code Civil, on which the Defendant relies, is very positive : " les dommages et intérêts ne sont dûs que lorsque le débiteur est en demeure de remplir son obligation, excepté, néanmoins, lorsque la chose que le débiteur s'était obligé de donner ou de faire ne pouvait être donnée ou faite que dans un certain temps qu'il a laissé passer."

Now Art. 1,139 explains how the debtor is " mis en demeure." " Le débiteur est constitué en demeure, soit par une sommation, ou par un autre acte équivalent ; soit par l'effet de la convention lorsqu'elle porte, que sans qu'il soit besoin d'acte, et par la seule échéance du terme, le débiteur sera mis en demeure." A summons, therefore, is not absolutely necessary ; any other act having the same force will do as well ; as a rule, any act which would suffice to interrupt prescription will have the effect of a " mise en demeure." But the summons or equivalent act must be in writing. The word " acte " used by the law seems to denote as much, and the authorities, TOULLIER VI, No. 253, amongst others, are clearly of opinion that a verbal notice will not suffice.

The Court finds in this case no " mise en demeure " either by summons or any other written notice ; there is nothing in the contract to show that the parties have waived in one way or another the necessity of a " mise en demeure " ; the obligation here is that of the landlord, to repair, and it is on account of an unlawful breach of that obligation that damages are claimed.

I am not called upon, in this case, to give an opinion as to what might be the effect of a concatenation of facts showing the intent of parties, if such facts could be adduced in evidence, where there is or ought to be a contract ; but I observe that in the facts alleged, it is stated that some workmen came, began the work of repairing and left their work unfinished. It is not alleged that even verbal notice was given to the Defendant ; that the workmen had left, or that the fact itself was in any other manner brought to his knowledge. I do not say that this could have sufficed ; very far from it ; but even this is not alleged in the Plaint.

The Defendant's objection must be sustained ; this action in damages must, under Art. 1146 and 1139 combined, be dismissed with costs ; unless the Plaintiff prefers to take a nonsuit.

SUPREME COURT.

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SAISIE PROVISOIRE,—REVENDICATION,— INTERPLEADER.

La partie qui réclame des biens mobiliers lui appartenant, et qui ont été indûment saisis sur un tiers, n'a pas qualité pour demander la nullité de la saisie ; il doit procéder par voie d'opposition à la vente, et de revendication (Interpleader).

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PROVISIONAL SEIZURE, — ACTION IN NULLITY THEREOF,—INTERPLEADER.

A party who claims moveable effects being his property and unduly seized on a third party, is not entitled to pray for the nullity of such seizure; he must resort to an Interpleader.

CAPEYRON & DELANGE,—Plaintiffs,

versus

DUPRAT & LAROQUE,—Defendants.

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Before:

His Honor the CHIEF JUSTICE and
The Hon. JUSTICE BESTEL.

—

E. PELLEREAU, —Of Counsel for Plaintiffs.
A. ASTRUC FILS, —Plaintiffs' Attorney.
P. L. CHASTELLIER,—Of Counsel for Defendants.
H. BERTIN, —Defendants' Attorney.

—

14*th May* 1869.

Duprat and Laroque, alleging themselves to be the creditors of one Nemours Delastelle, obtained an Order from the Judge at Chambers, under date of the 14th December last, for the provisional seizure of the cargo of rice alleged to be the property of the said Nemours Delastelle their debtor, and then on board of the schooner *Express*, Marchand, Master, anchored in the harbour of this Town of Port Louis; such provisional seizure to secure payment of a sum of $8,085 85 c. as set forth in the 1st and 2nd items mentioned in the affidavit in support of their application.

The provisional seizure of the said rice was made on the 16th December last.

On the 18th of the same month, the Plaintiffs obtained a Summons which was served on Delastelle and the other Defendants therein named, calling upon them to shew cause on the 21st December last, why the cargo of rice on board the said schooner *Express*, provisionally seized as aforesaid, at the request of the Plaintiffs, should not be landed *ex-officio* under the superintendence of one Valentine Rickwood, in his capacity of guardian of the subjects seized and stored in one of the Crown stores at the "Albion Dock," there to remain pending the litigation between parties, and until this Court shall have finally adjudicated thereupon, all rights of parties, generally whatsoever, being duly reserved, especially the rights and privileges of Messrs Canot and S. Aubert, the owners of the said schooner *Express*.

On the return day of the Summons, that is on the 21st December, the several parties mentioned in the Summons, appeared and were heard.

On the 22nd of the same month, it was ordered between Duprat and Laroque and Capeyron and Delange, by the Judge at Chambers, as follows:

"I grant that part of the application having reference to that portion of the cargo claimed by "Capeyron and Delange, on the condition that "Plaintiffs do pay the freight due for that por- "tion of the goods claimed by Capeyron and "Delange who consent to the Plaintiffs (Duprat "and Laroque) taking possession thereof and to "their storing them in one of the Crown lock "stores of the "Albion Dock," on the same "terms and conditions as those of the "Mauri- "tius Dock," for such storage. The respective "rights of the several interested parties duly "and fully reserved as to the form and merits"

For the sake of convenience, it would appear, We find in the margin of the original of the Judges' Order, the following memorandum:

"By consent it is agreed that Messrs. Capeyron and Delange shall cause the rice in dispute to be landed and sold, and the net proceeds deposited in the Registry of the Supreme Court of this colony. All rights and actions generally whatsoever, of all parties concerned, being fully reserved.

This 26th December 1868."

On the 30th December last, a summons was issued on the application of Capeyron and Delange, calling upon Duprat and Laroque to shew cause, at Chambers, on the 6th January now last past, why a Judge's Order delivered by His Honor Sir Charles Farquhar Shand, on the 16th day of December last, to Duprat and Laroque, for the provisional seizure of the cargo of the ship or vessel *Express*, set out in the summons, should not be annulled or rescinded to all intents and purposes, and why the provisional seizure consequent thereon, of the 16th December last, of the said goods, should not be declared null and void, and why the guardian of the seized goods should not be ordered to deliver the same to the Plaintiffs Capeyron and Delange?"

1st. Because Capeyron and Delange are *bona fide* holders of the bill of lading in the Summons referred to.

2o. Because the said Capeyron and Delange cannot, with regard to the rice in question, be bound by any exception which might be opposed to the said Nemours Delastalle, or any debts which he may owe.

3o. Because the said Nemours Delastelle is not, and never was, the owner of the rice in question.

On the 8th January 1869, an amendment was applied for, at Chambers, of that part of the Summons which referred to the delivery of the goods therein mentioned, by the guardian of the goods seized; Duprat and Laroque objecting to the application *in toto*, the Judge referred the matter, together with the amendment, to the Court. On the 27th January last, Capeyron and Delange applied and obtained, from Chambers, a Summons calling upon Duprat and Laroque to shew cause, on the 29th January, why the Judge's Order above mentioned, of the 30th December last, should not be rectified and amended, in so far as Valentine Rickwood (the guardian of the goods seized) is concerned, and why the said Capeyron and Delange should not be authorized to withdraw from the Registry, the proceeds which, after deduction of the freight, customs due and other costs, amount to the sum of $6,669.35c.,

and why they should not be allowed to retain the same.

Parties heard on the return day of the Summons the matter was referred to the Court, to be discussed when the principal action should be heard.

The principal cause came on for trial on the 18th March last, when P. L. CHASTELLIER took a preliminary objection to the demand in nullity of the provisional seizure made at the request of Duprat and Laroque.

Chastellier rested his objection: 1st On the nature of the action brought, *viz* an action in nullity of the provisional seizure practised.

2nly That the revendication of the articles alleged to have been unduly seized should have been demanded in the manner traced out by Art: 608 CODE OF CIVIL PROCEDURE, and no other; (see GILBERT'S note, and authorities therein cited Nos 2 & 3) which form of action is neither more nor less than what in our amended Colonial Code of Procedure is known under the name of an "Interpleader." (Rule 28, small Rules, and 78 Large Rules.)

3rdly That the agreement between parties, of the 26th December 1868, that Capeyron and Delange should cause the rice in dispute to be landed and sold, and the net proceeds deposited in the Registry of the Supreme Court of this colony, did away with the seizure, therefore with the necessity of bringing this action in nullity.

That true it was that all rights and actions, generally whatsoever, of all parties concerned, were fully reserved.

But this reservation could not and did not apply to the right of demanding the annullation of a seizure, which parties had agreed should be treated as non existing, for the purpose of proceeding to the immediate sale of the goods under seizure, with the view of speedying the exercise of their rights on the proceeds of the sale of the goods seized.

E. PELLEREAU answered: that the reasons alleged for the dismissal of the action in nullity of the seizure, were contradictory of each other.

1o. If the agreement has done away with the seizure, what would be the good of an Interpleader?

2o. The subjects seized are no longer in existence, by the fact of the sale thereof. The money has taken the place of the rice sold.

An action in revendication, even in the terms of Art. 608, would be superfluous.

3o. There remained, therefore, no other action for recovering either the subjects seized or their representative, the money, but an action in nullity of the seizure.

4o. The Interpleader has been introduced for the protection of the seizing Officers, and not for the 3rd party whose property has been unduly seized, who is left to the ordinary remedy by our law, *viz*: the action in nullity of the seizure of his goods.

JUDGMENT.

The action to be resorted to by one alleging himself the owner of subjects seized in the possession of a debtor, at the request of an execution creditor, to recover his property so unduly seized, appears to us plainly traced out by the text of Art. 608, C. P. C.

"Celui qui se prétendra propriétaire des ob-
"jets saisis ou de partie d'iceux, pourra s'oppo-
"ser à la vente, par exploit signifié au gardien,
"et dénoncé au saisissant et au saisi, contenant
"assignation libellée et l'énonciation des preuves
"de propriété, à peine de nullité."

But the words *pourra*, which precedes the word "s'opposer" has led the Court of Bordeaux. (S. V. 32.2-17·) to infer that the mode traced out by Art, 608 was not the only remedy to be resorted to by the 3rd party for recovering the property unduly seized, and that he might, if he chose have recourse to the action in nullity of the seizure. CHAUVEAU on CARRÉ Art: 608. C.P.C. Quest: 2075. p. 747, puts to himself the following questions:

"La femme qui se prétend propriétaire des
"meubles saisis sur son mari, est elle autorisée a
demander *la nullité des poursuites.* ?

The answer is "Non": la *demande en nullité est spécialement* reservée *à la partie saisie*, and the reason of this is, that allowing the 3rd party to demand the nullity of the seizure, it would be allowing him to avail himself of a right belonging to the party seized (S,V. 32. 2.17,Note 1—CARRÉ *Lois de la Procédure*, No. 2075); et d'ailleurs ce moyen est *inutile* puisqu'il est remplacé par un autre moyen *plus efficace et plus assuré*: *celui de l'opposition à la vente*, indiqué par l'Art: 608 C. P. C. C'est ce qui a été jugé par un arrêté de la Cour de Bruxelles (S. 15. 2. 175.)

"Cette solution a été de nouveau consacrée
"par la Cour de Nimes, le 16 Mai 1829, (DALLOZ
"29. 2. 230. See also SIR. VIL. 32. 2. 440) et
"nous ne la croyons pas susceptible de doute
"malgré un arrêt contraire de la Cour de Bor-
"deaux, du 31 Aout 1831."

"Quoique la question semble borner cette dé-
"cision à la femme du saisi, il est bien entendu
"qu'elle s'applique à *tout tiers* qui se prétend
"propriétaire des meubles saisis sur le débiteur."

So much for the French authorities. On turning to our Colonial Law, we find that: "if any claim be made to or in respect of any goods or chattels taken in execution under the process of the Court, or in respect of the proceeds or value thereof, by any person not being the party against whom such process has issued, it shall be lawful for the Registrar, upon application of the Officer charged with the execution of such process to issue a Summons calling before the said Cout as well the party on whose behalf such process is used, (that is the execution creditor) as the party making such claim; and the Court

shall adjudicate upon such claim &a." (Small Rules No. 26.)

This case being of a commercial nature, is subject to the small Rules of Court, (Art. 78. Large Rules) and the remedy of Art. 28 above quoted, must be resorted to in this as in all other Commercial cases, that is an Interpleader.

There is no doubt that the protection of the seizing Officer may have prompted that remedy.

But does not the right of the claiming party, deserve and demand equal protection ?

If he be not permitted, in his own proper person, directly to apply to the Registrar, for the Interpleader Summons, he is surely not debarred the right of lodging his claim with the seizing Officer, so as to compell the latter for his own protection and the protection of the claiming party, to apply to the Registrar, for the interpleader summons. In England as in France, the general rule is that the Defendant, himself, that is the execution creditor, cannot apply, under the act, (Interpleader act) which applies only to persons "not being parties" against whom the process issues; so that the act does not apply to a Defendant alleging the Judgment or Execution to be void (CHITTY'S ARCHBOLD'S *pract*: page 1221).

And what does all this show ? that in England as in France, the action in nullity of a seizure is an action to which the Defendant (or party against whom the process has issued) is alone entitled; and that revendication, like an Interpleader, is the sole legal mode as traced out by Art. 608 C. P. C. and the Rules of Court, to be resorted to by the claiming party, to recover possession of his property unduly taken in execution, or the *proceeds* thereof.

The necessary inference to be drawn from all that has been said is, that speaking the language of our Civil Code, Revendication is the remedy to which the Defendant should have resorted for the assertion of their alleged rights, either to the rice or its proceeds, and what comes to the same thing in the language of our Rule of Court or of the English Interpleader Act, an Interpleader should have been resorted to for the same purpose.

Another point has been mooted in this case, viz.: the substitution of a claim to the proceeds of the sale of the rice originally provisionnally seized, to the rice in kind mentioned in the summons obtained at Chambers.

This amendment, being rendered necessary by the altered state of things, we might have allowed, had the proper action been brought.

But the Defendants having mistaken their remedy, the allowance of the amendment would assist neither the parties nor the Court, in bringing this suit to an end.

However, were parties to come to an understanding to overlook the mistake, and to treat this action in nullity as a regular Interpleader, the Court would have no objections in allowing the amendment prayed for, so as to expedite the Decision of this case and save the parties further costs.

In default thereof, action dismissed with costs.

SUPREME COURT.

INTERROGATOIRE SUR FAITS ET ARTICLES.

Les réponses faites par un Défendeur interrogé devant la Cour Suprême, sur faits et articles, ne lient point son co-Défendeur.

EVIDENCE,—INTERROGATORY, — PERSONAL ANSWERS.

The answers of a Defendant called before the Supreme Court, to be heard on his personal answers, are no evidence against the other Defendants in the cause.

RAYNAUD,—Plaintiff,

versus

DURHONE AND ANOTHER,—Defendants.

Before:

The Honorable JUSTICE BESTEL and
The Honorable JUSTICE COLIN.

L. ROUILLARD, —Of Counsel for Plaintiff.
E. DUCRAY, —Plaintiff's Attorney.
E. PELLEREAU,—Of Counsel for Defendants.
A. ROHAN, —Defendants' Attorney.

14*th May* 1869.

The delay for pleading, by Mrs Ebrard one of the Defendants in this cause, having expired, the Rule served upon her to shew cause why Judgment should not be signed against her for want of Plea was made absolute; default was merely recorded against her, but Judgment on this default was reserved until Judgment should be given on the merits for or against the vendor Durhone.

On the 19th February instant, L. ROUILLARD, on behalf of the Plaintiff, put the defaulter Defendant, widow Ebrard, into the box, for the purpose of a personal interrogatory.

To this E. PELLEREAU, for the Defendant Durhone, objected: 1o. Because any statement the Defendant might make, however binding upon her, would not be evidence against her co-defendant Durhone, should she go so far as to admit the existence of fraud between herself and Durhone; this statement sworn or unsworn could not be

opposed to Durhone. The absence of any Plea on her part, to rebut the charge of fraud urged against her, however strongly it may tell against her, is no evidence of fraud on the part of her vendor Durhone, and unless collusion be brought home to the vendor, the sale made by him to Mrs. Ebrard must be upholden by the Court.

ROUILLARD, however, insisted upon the personal answers of the co-defendant, widow Ebrard, for the purpose of making up a *prima facie* case against her.

It appears to us he is already in possession of that *prima facie* case he seeks to establish against the widow Ebrard.

The Declaration was duly served upon her. She has allowed the time for pleading to run out. Called upon by a Rule of Court to shew cause why Judgment should not be signed against her, she has allowed the Rule to be made absolute. Default was recorded against her. Of this she does not complain. Does not this shew, as far as she is personally concerned, that she has no defence to make to the demand, and is not her silence sufficient prima evidence of the fraud urged against her, personally; might not a Judgment *nil dicit* have been signed against her?

Thereupon she would have been out of Court, and an entire stranger to the parties in Court.

If a stranger to the suit, she could not be examined.

Assuming, however, the possibility of her being examined, and assuming that she were to tell us of Durhone's fraudulent intentions in selling her his house, her statement, even upon oath, would not be evidence against her accomplice, *à fortiori* could not her statement, *not on oath*, be urged against Durhone, as evidence of the guilt laid to his charge.

The case of *Lucas* v *Didier St Amand* is no precedent.

Didier *had pleaded "not indebted."* On the day of trial Didier did not appear, and G. GUIBERT was called upon to make out a prima facie case against him. Not having any other evidence of the facts charged in his Declaration, he asked for the appointment of another day for the personal interrogatory of the Defendant.

In this case we have no Plea of any kind. Default was given against Mrs Ebrard, on the return of the Rule to shew cause. Judgment *nil dicit* might have been signed against her, had she been alone. But as it is necessary, in order to annul the sale between parties, that fraud should be brought home to the vendor as well as to the purchaser, the Court delayed its Judgment on the default made by Widow Ebrard, until such time as it should be in a position to say whether, or not, the fraud alleged against the vendor had or had not been made out.

The Court, therefore, allows the objection of PELLEREAU.

SUPREME COURT.

SÉQUESTRE,—GUANO,—GAGES ARRIÉRÉS.

SEQUESTRATION,—GUANO,—ARREARS OF WAGES.

LISIS CANTIN, Subguardian of the minors Marie Mathilde and Louise Emmeline Dioré, } Plaintiff.

versus

1o. JOSEPH JULIUS WILSON,
2o. WIDOW PIERRE DIORÉ,
3o. GALDEMAR FRÈRES, } Defendants.

Before:

His Honor the CHIEF JUDGE and
The Hon. JUSTICE BESTEL.

E. PELLEREAU, —Of Counsel for L. Cantin.
J. MERCIER, —Attorney for same.
A. LEGALL, —Of Counsel for Wilson.
J. PIGNÉGUY, —Attorney for same.
E. BAZIRE, —Of Counsel for Wid. Dioré
E. LAURENT, —Attorney for same.
P. L. CHASTELLIER, —Of Counsel for Galdemar Frères.
F. VICTOR, —Attorney for same.

14*th May* 1869.

A motion was made, yesterday, before the Court, for a Rule placing the Sugar Estate *Rich Fund*, situate at Flacq, under Judicial Sequestration, pending the proceedings in "Folle Enchère" thereof, and up to the day of the final adjudication, according to the terms and conditions mentioned in the Schedule annexed to the Judge's Order, of the 14th April present month.

The only objection to the above motion referred to the guano asked for in the Schedule mentioned, which item was, however, subsequently withdrawn by Pellereau.

In the absence of consent, to that effect, of all the Mortgaged Creditors of the Estate, it is impossible that the Court should allow the payment of the arrears of wages due to the laborers of the the said Estate.

With the exception of those two items, viz: the guano and arrears of wages prayed for, the Court orders that the sequestrators hereinafter named, do supply to the Estate *Rich Fund* the requisites set out in the Schedule aforesaid pending the proceedings of the "Folle Enchère" and up to the day of the final adjudication of the said Estate.

Thomas, Lachambre, & Co. having been the first to offer to undertake the sequestration of the said Estate, without interest, and on the mere commission of 2½ per cent, the Court, therefore, appoints Thomas, Lachambre & Co. sequestrators of the said Estate, on the conditions set out in the Schedule herein before referred to.

Costs to be costs of sequestration.

BAIL COURT.

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AMENDEMENTS,—POUVOIR DES MAGISTRATS DE DISTRICT A CET ÉGARD,—APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT.

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AMENDMENTS, — POWER OF DISTRICT MAGISTRATES TO THAT EFFECT,—APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE.

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GALÉA,—Appellant,

versus

AUTARD AND UX.,—Respondents.

—

Before:

His Honor SIR C. F. SHAND.

—

H. GALÉA, —Of Counsel for Appellant.
EUG. BAZIRE,—Of Counsel for Respondents.

—

28*th May* 1869.

This was an Appeal from a Judgment of the District Magistrate of "Moka," sitting on the Civil side.

The case arose in the following way: In the month of December last, the now Repondents Mrs. Autard, and her husband "for the validity of the proceedings and the authorization of his wife," presented to the Court, below, an application setting forth that the Defendant had been trespassing upon a piece of ground of about 40 acres, belonging to her, the said Mrs. Autard, at the "Quartier Militaire," of which she alleged that she had been in quiet and peaceable possession, as owner, for more than one year before the trespass complained of. It was further averred by the complainants, that the Defendant, Mr Galéa, had been trespassing, particularly, by cutting and carrying off wood from the ground in question.

The Plaintiffs craved that Galéa should be ordered to cease all trespassing for the future; that the Plaintiff, Mrs. Autard, should be restored to the peaceable enjoyment of her property, and that the Defendant should be farther condemned to pay her £50 as damages for the wood, with interest and costs.

After several adjournments granted by the Court, below, at the request of the parties, the hearing of the case began on 8th January last, when the Counsel for the Defendant objected that the Plaint was not properly entered: 1o. in respect a married woman cannot sue in her own name; 2o. that the Court was incompetent, as Mrs. Autard had alleged that she was the owner of the land in question; and, 3o. the Plaint was said to be badly entered, as the date of the alleged trespass was not stated, and the various qualities of being public, uninterrupted, etc., which an alleged possession must have by law to support such an application, were not set forth in the Plaint; and it was contended, on those grounds, that it should be declared null and void.

The Court overruled the objection to its competency, declined to declare the Plaint null on the ground of the various defects alleged by the Defendant, but ordered it to be amended by the insertion of the omissions to which the Counsel of the Defendants had specially directed attention.

At the same hearing the Defendant's Counsel waived, for the present, his first objection "as to "a married woman's capacity to sue in her own "name."

The case, then, went to trial upon the Plea of the Defendant, which was "the general issue *non est factum*."

The Plaintiffs examined 6 witnesses and the Defendant, then, proposed to renew his objection that a married woman cannot sue in her own name; but the Magistrate decided that the objection could not be revived and discussed, after the merits of the case had been entered upon. Seven witnesses were then heard on behalf of the Defendant, and after the argument of Counsel, the Court, on 22nd March last, gave Judgment for the Plaintiffs, except as to the claim of damages for cutting down the trees. As the parties had confined the case to the question of possession, and the issue of property of the land was not raised, and seeing that the trees necessarily belonged to the owner of the land, on which point there was no evidence, the Court did not find itself in a position to decide the matter of damages; costs of suit were also given against the Defendant.

Mr. Galéa appealed and counsel were heard on both sides; Mr. Galéa for Appellant, Mr. Bazire, *Senior*, for the Respondents.

THE COURT.

The Defendant in the Court, below, now stands as Appellant here, and the case has been fully and fully argued by Counsel on both sides. The discussion generally has turned upon the same points as were urged before the District Court.

The Counsel for the Appellant has argued that the orignal plaint, as it altogether omitted the various ingredients, so to speak, of that possession required under Art. 23 of the Code of Civil Procedure, to support such a Judgment as was asked by the complainant, could not competently be amended, and that consequently the Magistrate, in allowing the amendment, really made a new Plaint for Autard and wife, and went altogether beyond his powers; I am clearly of opinion that this ground of appeal cannot be sustained; but, as will be noticed by and by, I think the question of costs should have been somewhat differently dealt with by the Magistrate as to the power of the District Judge to amend defective Pleadings under our form of process; it is one of a very broad and extensive nature;

The words of the Rules in the Court below § 48, are these:

"The District Magistrate may at all times, amend all defects and errors, both of substance and of form, in any proceedings in Civil matters, whether there is any thing in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; all such amendments may be made with or without costs as to the Magistrate may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit, the real question in controversy between the parties, shall be so made."

It was contended by the Appellant's counsel, that as the complainant did not make a formal motion for leave to amend, the Judge had no power to make such an amendment *ex-proprio motu* But this is a mistake. In practice, the suggestion to amend defective pleadings often comes from the Judge; indeed it is his duty with the view of shortening the delay and lessening the costs of Justice, to put the pleadings in any case where this is possible, in such a shape as to determine in the suit actually before him, the real question at issue between the parties. This is undoubtedly the meaning and intention of the legislature, and is, I think, clearly evinced by the concluding words of the section of the Rule just quoted. The first ground of appeal cannot, therefore, be admitted.

In the next place, the Appellant renewed, in this Court, his contention in the Court below, that the husband Autard should have sued as administrator of the legal community of goods which must be presumed to exist in the absence of any positive proof that the wife was, herself, the proprietor of the land in question. But the Magistrate held that this objection having been waived *in limine* of the discussion below, could not be, again, renewed after the merits of the case had been entered upon. In this opinion as a general and established rule in Jurisprudence, I must concur. It was argued that the matter being one of "quality" of the Plaintiff, might be urged at any stage of the case; but that doctrine which, in some of the authorities quoted was pushed to an extreme, cannot apply to this case, when the point had already been mooted and had been given up at the earlier stage; and, secondly, it must not be lost sight of that the objections, even if it had been receivable at the later stage of the proceedings, could scarcely have been dealt with as fatal to the instance, looking at the very extensive power of amendment bestowed upon the Court, at any stage of the process to have the real question between the parties disposed of in the actually depending suit. I agree with the District Magistrate in thinking that in the actual state of the pleadings in the case, the point could not be again raised by Mr Galéa's counsel; but even if it could have been renewed and if the point had been ruled in his favor, this would probably have led, not to the dismissal of the case, but, to an amendment of the pleadings.

Coming now to the merits and the statement of the witnesses adduced on both sides, we find that the evidence is very contradictory. The Judge in the Court, below, a gentleman of great standing and experience, has said in his Judgment that "the evidence is painfully conflicting." This is unfortunately but too true.

The District Magistrate has farther arrived at the conclusion that, "on the whole, the weight of evidence appears to me to preponderate in favor of the Plaintiffs and to shew that through Villemain their assignee or lessee, they were in lawful possession of the said ground, and that they have been unduly disturbed by the Defendant."

It appears to this Court that the case upon the proof adduced, is one of difficulty; but it is a fixed rule of our Jurisprudence that the judgment of the Magistrate, in the Court below, who performs the functions both of Judge and Jury, will not be disturbed in the Supreme Court, unless the Judges of the latter are quite satisfied that a mistake resulting in a miscarriage of Justice has occurred in the case. It must be remarked that the Judge, below, has the very great advantage of seeing and hearing the witnesses depose in open Court, under his own eye and in presence of the parties, their counsel and the Public.

He has the fullest opportunity of observing the witnesses, and noting their appearance, their character and demeanor. In the case now before me, although I may not agree with him in all the reasons which he has given for his judgment, I see no grounds for altering his decision on the merits of the case; but I cannot concur with him as to costs.

I am satisfied that considerable delay and expense arose in the Court, below, from the careless and defective manner in which the original Plaint was prepared, leading to the necessity of extensive amendments.

I do not think that in these circumstances, the original complainants, tho' ultimately successful in the Court below, were entitled to their full costs.

On the whole matter, I dismiss the appeal and affirm the Judgment of the District Magistrate, except as to the costs below. I find the orignal Defendant, Mr Galéa, liable to pay only one half of the costs of the original complainants in the District Court. The costs of the appeal to be borne by the Appellant.

SUPREME COURT.

DEVIS ET MARCHÉS,—ACTION EN PAIEMENT DE TRAVAUX FAITS SUIVANT CONVENTION,—CONTRAINTE PAR CORPS.

WORK AND LABOUR DONE,—CAPTION OF THE BODY.

FEBURE MARTIAL, & Co.,—Plaintiffs,

versus

CAPERRE AND ANOR.,—Defendants.

Before:

His Honor SIR C. F. SHAND and
His Honor JUSTICE COLIN.

G. GUIBERT, —Of Counsel for Plaintiffs.
F. ROBERT, —Plaintiffs' Attorney.
P. L. CHASTELLIER,—Of Counsel for Defendants.
M. SAUZIER, —Defendants' Attorney.

28*th May* 1869.

This was an action for work and labor done in erecting a Circus in the "Champ de Mars," to be used by the Defendants, for the public exhibition of equestrian performances.

It appeared that, by an Act under private signatures, dated 3rd November last, the Plaintiffs undertook to erect for the Defendants, a circus in wood, according to an annexed Plan, for the sum of $1,200, the price to be paid $600 cash and $600 20 days after the delivery of the building. The wood was to remain the property of the Plaintiffs and to be removed at the close of the exhibition. The work was to be begun the twenty fourth of the then current month of November, and to be finished, at the latest, on the fourth of the following December, and failing delivery of the building on that day the Plaintiffs were to pay to the Defendants $100 a day, as penalty for their want of punctuality. On the 5th December, the Defendants agreed to a prolongation of the time for two additional days for the purpose of having certain floorings added to the seats, and they promised to pay the first $600 when those additions were finished without any dispute.

In their Declaration the Plaintiffs alleged that they had executed all the work and delivered the building in due time on the fifth December; that the Defendants, of said date, paid them the sum of $200 to account of the $600 which they were bound to pay cash on the delivery of the circus: the Plaintiffs, therefore, concluded for payment of $1,000, interests and costs.

The Defendants, in their Plea, denied that the work had been executed at the time stipulated; they denied that they had taken delivery of the circus, and alleged that up to the 14th December the building was unfinished, and that of that date they found it necessary to summon the Plaintiffs to deliver it over and to shew that it was so well built that the Municipal authorities had granted permission to use it for public representations by the Defendants and their *troupe*; that the Defendants, on the 15th December, had called on the Plaintiffs to make the building fit for the purposes for which it had been constructed, as the Municipal authorities refused to allow it to be opened to the public: that on the sixteenth December, the Defendants served a notice on the Plaintiffs, that as they had not taken steps to comply with those summonses, the Defendants would, themselves, have the necessary alterations completed and the Defendants alleged that they were, themselves, compelled to have this done, the Plaintiffs having failed to do so; that deducting the payment which they had made to account of the price $200, the farther sum of $93.55 paid to divers persons for work done, and $190 paid to Duchenne for completing the Circus, according to the requirements of the Town Architect, and the forfeiture of $100 a day for every day's delay after the stipulated period of delivery, which the Defendants reduced voluntarily to the sum of $500, there remained the amount of $216, which had been tendered to the Plaintiffs, and on their refusal to accept the tender, the money had been consigned in the Registry of the Supreme Court.

Issue was joined on the respective averments of parties, and evidence at length was led on both sides.

THE COURT.

We have, now, to consider the results of the evidence in this case.

The proof as to the building having been originally constructed with sufficient materials and strength, was divided; but it was shewn that on the 5th December, the day of delivery, while the building, generally, was finished, it was discovered that the flooring of part of the seats had not been mentioned in the agreement, and the Defendants granted two days in addition for this being done, and promised to pay the first instalment of $600, as soon as this flooring was added "sans aucune contestation." In point of fact $200 was paid to account on the said 5th of December, and the receipt granted by the Plaintiffs and accepted by the Defendants was couched in the following terms: "Reçu de M. Vincenti Alvarez la somme de $200 à valoir sur "celle de douze cents piastres, pour le cirque "que nous lui avons fait au Champ-de-Mars. "(Signé) F .Martial & Co."

The Defendant, also proceeded to paint the building, and to introduce gas into it and advertized in the newspapers of the 11th December, that the circus would be opened to the public next day, viz. "Saturday the twelfth, with the permission of the Mayor." It appeared, however, that the announcement, so far as regarded the Mayor's permission, was premature, for, on the fifteenth December, Mr Merle, the Town Architect, reported to the Mayor that the building was not sufficient, and altho' the Plaintiffs, when called upon by the Defendants, stated their willingness for the purpose of avoiding legal difficulties and "law suits" to make such improvements as Merle might require, the Defendants, themselves, had them executed at the costs of $190.

Of the same date, viz. the 15th December, the

newspapers announced that the opening of the circus, formerly advertized for the 12th had, "on account of the bad weather," been postponed to the evening of that day (15th.) From that date the circus was regularly opened to the public.

It appears to the Court that the difficulties in the present case, have arisen from the parties not having kept in view, from the beginning, that before an erection of this nature could be put to the use for which it was intended, the formal permission of the Municipal authorities was required for the safety of the public. We think it is established upon the evidence, that, at the time stipulated, the Plaintiffs had fairly completed the building and put it at the disposal of the Defendants who granted a prorogation of the time for two days, that certain additional planking should be added under a part of the seating, promissing to pay the first instalment " sans aucune contestation. "

The Defendant made no complaint with the way in which the work had been done ; they took possession of the building, introduced the gas fittings, proceeded with the painting, and the Defendant Alvarez paid a part of the price to account and accepted a receipt that the payment was " pour le cirque que nous lui avons fait au Champ de Mars. "

They advertized the opening for saturday the 12th December, with the permission of the Mayor, and subsequently, viz ; on the 15th December, countermanded this by a fresh notice, sufficiently intelligible, now that the real position of matters is known, that the representation had been put off on account of the " bad weather. "

It will be remarked that on the original act, there was nothing said as to the Plaintiff's undertaking to erect a building which should pass the official examination of the Town Architect, though such a stipulation would probably have saved much of the subsequent difficulties. All that was said in the act, was that the circus should be built " according to an annexed plan." Were we obliged, for the decision of the case, to determine the question whether, without any positive stipulation given to that effect, the building, looking at the purpose for which it was intended, ought to have been constructed by the Plaintiff, of such strength, as to pass the Municipal Survey, we might have found the point in the circumstances actually occurring here, one of considerable difficulty ; but it is not necessary that it should receive an actual solution here. For, it must be said to the credit of the Plaintiffs, that throughout the whole operations for the construction of the circus, it is in evidence that they willingly received and acted upon suggestions for the improvement of its stability, from whatever quarter emanating, and as soon as they were informed that the Architect of the Municipality was not satisfied with its construction they, at once, offered to execute whatever improvements he might desire. The Defendants, altho' they had called upon the Plaintiffs to do this, did not give them time to perform the work themselves, but had the improvements executed as we have seen, at a cost of $190.

In the whole we are satisfied that, substantially, the Plaintiffs have made good their case. But, in the settlement with the Defendants, they must give credit for various sums disbursed by the latter for materials and for work done in the course of the erection of the circus. The Plaintiff do not dispute their liability generally for these deductions which are as follows : Account Jules £6 ; do. Elie $15 ; do. Pierrot & Co. $45 11 ; do. Houdlette & Perkins £24 61c and $2 83 : do. Duchenne $190. In the aggregate $283. Under abatement of this amount, we give Judgment for the sum claimed in the Declaration, with interest and costs of suit and Caption of the bodies of the Defendants, limited to 12 months.

SUPREME COURT.

IMPUTATION DE PAIEMENT,—CONSIGNATION DE MARCHANDISES, — BALANCE DE COMPTE COURANT,—REFUS DE LIVRER LA MARCHANDISE A DÉFAUT DE PAIEMENT.

Le Négociant qui expédie, sur demande, un envoi de marchandises à un tiers qui lui doit déjà une balance de compte courant, et qui, dans l'intervalle, reçoit de ce tiers une remise qui couvre la balance du compte courant, mais qui ne suffit point à payer, en outre, le prix du dernier envoi, peut charger un agent de prendre livraison des marchandises à leur arrivée au port de destination et de ne les livrer au tiers que sur paiement intégral.

APPROPRIATION OF PAYMENTS,—CONSIGNATION OF GOODS,—BILLS OF LADING,—BALANCE OF AN ACCOUNT CURRENT,—REFUSAL TO DELIVER GOODS, EXCEPT UPON PREVIOUS PAYMENT.

Where a Merchant, had upon application, shipped an Invoice of goods for the account of a third party who owed him already the balance of an account current, and where, in the meanwhile, the third party had effected a remittance which was of greater amount than the balance due, but did not suffice to pay the balance coupled with the last invoice, the Court ruled that the Merchant was entitled to send orders to an agent to receive the goods when landed, and refuse delivery except upon full payment thereof.

ALFRED SERENDAT,—Plaintiff,

versus

GARBERT,—Defendant.

Before :

His Honor the CHIEF JUDGE and
The Honorable JUSTICE COLIN.

W. NEWTON,—Of Counsel for Plaintiff.
E. SAUZIER, —Plaintiff's Attorney.
G. GUIBERT,—Of Counsel for Defendant.
J. GUIBERT, —Defendant's Attorney.

28*th May* 1869.

This was an application referred to the Court, by Mr Justice Bestel to whom it had been made in Chambers; the Plaintiff's object was to obtain an Order upon the Defendant, who is, in this Colony, the agent of Messrs. Fra, Horner & Co. of London, for the delivery of certain goods and merchandize shipped for the account of Plaintiff on board the *Dunloe*, and retained by Garbert in whose possession the bills of lading are. The Defendant declines delivering the goods which have been consigned to him, until the same are paid for. It appears, from the letters produced, that the Plaintiff had dealt for some time with the London house, receiving goods directly, and remitting directly the price of the goods received. It also appears that when the differences arose, which have led to this suit, there was a balance of £49.11.1 due from the Plaintiff, to Fra, Horner & Co. On the 18th August 1868, the Plaintiff ordered a new invoice of goods, apologizing at the same time for not having replied to letters received, and announcing a remittance by the next steamer. Horner & Co. answered that letter, on the 7th October 1868, promising their most careful attention, and hoping that by the next mail they will send complete invoice and bill of lading. On November 7th 1868, Horner & Co. write again, and state that they expected a remittance for the balance due to them, but have not received it; they draw in favor of Garbert, for that balance, but add, that Serendat need not accept the draft, if when it is presented the remittance has been sent, Garbert would cancel the draft.

It now appears that on the 17th October 1868, Serendat enclosed a second order to Horner & Co., but no remittance; Horner & Co. answer on 7th January 1869; that second order is to remain for the present in abeyance, and the Plaintiff is informed that the goods forwarded to his previous order, Horner & Co. have been obliged to consign to Garbert, a mutual friend, and that no orders can, for the present, be executed, without a remittance.

On the 18th December 1868, Sérendat sent a draft at 90 days for £100 on the Oriental Bank; that draft Horner & Co. acknowledge on 6th February 1869; they inform Sérendat that the same has been placed to his credit and repeat their former advice that they had drawn for their balance, and presume that their draft was not accepted.

The goods ordered on 18th August last, and shipped by "Dunloe," are now in the possession of Garbert who states himself ready to deliver the same, provided the balance due on the value of the goods be paid, or to deliver such portion of the said goods, at the option of Plaintiff, as shall amount to the value of the £100 remitted, minus the £49.11.1, balance of the old account.

The Plaintiff now says that he intended the remittance of £100 to cover the goods ex 'Dunloe,' and that according to the course of dealing between the parties, the London house had no right to consign the goods to Garbert, without due or sufficient notice that they intended to vary the course of dealing.

There is no doubt that Merchants or trade ought not capriciously to change a settled moc of dealing with their customers. There shoul be fair notice or sufficient cause. On the othe hand, if those who receive goods unpaid for, a not regular in sending remittances, they hav generally at least, but themselves to blame if cre dits become shorter, and conditions more severe

According to the facts before us, we have n evidence of the course of dealing for any lengt of time previous to the day when the Londo house resolved to consign the goods to Garber Goods were sent out, and money remitted, bu how long, under what circumstances, under wha stipulations, that mode of business had been car ried on, we find little or nothing to enlighten us But we have evidence that on the 18th Augus last, the Plaintiff who had not written for severa months, and had a balance against him, gave a order and promised to forward a remittance b the following mail. The following mail, and tw other mails subsequent to that, brought no re mittance; in fact, none was sent before the 18t December, and by that time the London hous had given notice to the Plaintiff that they ha drawn for their balance, but that the Plaintif need not accept the draft, if he had remitted when it was presented.

The Plaintiff's draft was carried to the Plain tiff's credit, apparently as usual, and the Plain tiff neither accepted the draft for £49.11.1 no has he remitted or paid here any other sum o money.

He now urges that his £100 remittance shoul cover the goods ex "Dunloe"; he has paid th price of the goods; so runs the application There is no proof that the £100 were originall intended to be applied specially to the payment of the goods shipped on board the "Dunloe" and, surely, if the Plaintiff had meant the "Dun loe" order to be a a special one, he would have accepted and paid the draft on him for his agent's balance; he has done nothing of the kind.

We do not consider, therefore, the £100 remittance to have been a special one, we must hold it to have been meant: 1o. to pay the balance due to Horner & Co., 2o. to be applied to meet any further claim for goods shipped as per order.

But it is also urged that if Garbert, here, keeps the goods, the course of dealing is unduly changed. Garbert should deliver the goods, and the Plaintiff remit any balance he may owe.

We cannot follow the Plaintiff so far as he would lead us; we think he has had timely and sufficient warning; we think he has but himself to blame if his credit with the London house is no longer allowed to stand on the same footing as before. That credit does not appear to have been, at any time, long or large.

The Plaintiff's business with Horner & Co. does not, so far as the evidence can show, appear to have been, at any time, extensive. In August last, he owed nearly £50; that sum he was to pay, he promises to remit and is 4 months before he remits; he had been 3 months at least

without writing when he made the promise. When he does remit he sends a draft for a sum which is very inferior to the amount of the balance he owed and the value of the goods ordered. We are of opinion that the London house upon the state of things that has come out in evidence, finding orders sent with greater regularity than remittances were effected, were entitled, whilst executing the order without delay so as to cause no inconvenience, to direct their Agent not to deliver, unless payment were effected by cash here, or a remittance to them in London. We find the offer made by Garbert, in a notice served on the 22nd April last, upon the Plaintiff, to deliver an assortment of goods so as to meet the difference between £100, and the balance of £49 11s 1d, or to pay that difference in money, very equitable, if the Plaintiff declines taking delivery of all the goods upon payment of the whole price of the goods. We are of opinion that the Plaintiff's case resting upon the allegation that he has paid the price of the goods per *Dunloe*, fails, and therefore must consider and hold that Plaintiff do take nothing of his application which is dismissed with costs.

SUPREME COURT.

SÉQUESTRE.

Gages arriérés,—Honoraires de médecin et comptes du pharmacien, — Terres en location,—Loyers échus,—Dépenses courantes.

SEQUESTRATION.

Arrears of wages,—Fees due to the medical practitioner and account of the pharmacopolist,—Leased grounds,—Rent due,—Petty expenses.

IN THE MATTER OF THE SEQUESTRATION OF THE "FAIR FUND" ESTATE

Ex parte : ANTOINE GENÈVE,—Applicant.

16th March 1869.

In this case, E. LECLÉZIO Senior, for Antoine Genève one of the co-owners of the *Fairfund* Estate, seized at the instance of Mr Coignet a hypothec creditor, applied for the sequestration of the said Estate, and moved that certain payments and advances be ordered to be made by the sequestrator.

The hypothec creditors of the said Estate, some under their written consent and others, Messrs DUVIVIER & PISTON, having appeared and assented at the Bar, consent that the arrears of wages, due to the laborers, be paid to such laborers.

Under that consent we shall allow the sum of $1,905.33 to be paid by the Sequestrator to the laborers and employés of the said Estate for arrears of wages for the months of October, November, December 1868 and January 1869, provided that does not exceed the amount found to be due to them by the Stipendiary Magistrate of the District, otherwise the sum to be reduced to the amount actually found to be due.

Also the sum of $500 for arrears for the month of February, under the same conditions.

That the sequestrator shall also pay the running wages not to exceed $500 a month. Also the provisions required for laborers, and the food and the fodder required for cattle, the whole not to exceed $400 a month.

The rights of the Medical Practitioner and the sums due by the owners of the Estate for medecines supplied, we make no order upon, leaving the parties interested to make good such rights or claims, if any, as by law directed, upon the purchase price of the Estate.

We do not feel justified upon the evidence, in charging the whole Estate with the rent due on account to Letellier's ground, but we shall be disposed upon the written consent of the hypothec creditors, no personal creditor having appeared to object, to allow the item prayed for on that account.

We consider the sum to be paid by the sequestrator for petty expenses, which are only generally mentioned, should not exceed $50 per month ; we allow that sum on that account.

In the course of the proceedings, Messrs J. & N. Harel intervened, and as owners of a plot of ground leased by them to the owners of *Fairfund*, objected to any sequestration privilege encumbering their land. That objection ought to prevail ; the owners of land leased, cannot possibly, without their assent, see their position as owners and landlords, made worse by a privilege created for the benefit of the owners of an estate and their creditors.

The condition of this sequestration order, therefore, shall be that the sequestrator shall have no right whatsoever over the land which is the property of Js. & N. Harel and by the latter let to the owners of *Fairfund* Estate. Mr Duvivier one of the hypothec creditors consented to provided his rights of "Folle Enchère" be reserved to him. This was not objected to, and Mr. Duvivier's rights are reserved. Mr. George Aubin is willing to be appointed sequestrator, provided his advances be repaid to him at the expiration of the delay to be fixed for the said sequestration, and that he do have the right of forcing on the sale of the said Estate in case he be not paid. Mr. Aubin charges in addition 12 o|o interest and 2½ commission. We find the terms high ; but as no one objects, we presume that no better terms can be obtained and we shall appoint Mr. Aubin sequestrator at those rates with full powers to force on the sale, if at the expiry of the sequestration order, he be not reimbursed.

The sequestration shall come to an end on the 15th June next.

Costs to be costs of sequestration.

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accede to his proposal, but contended that his conduct had been such that the application for the *Cessio Bonorum* should be, itself, refused.

From the examination of the Insolvent and the evidence of the witnesses adduced in the case, it appeared that he had purchased the Estate *Beaux Songes*, in the year 1866, for the sum of $56,800, while he admits that all the property he then possessed was only a few thousand dollars, about $10,000. To make up the necessary amount for the deposit, viz: one fourth of the sale price, the Insolvent entered into an arrangement with a Commercial Firm of Port Louis, whereby he undertook to make good a mortgage claim of some $14,000 due to it by a former owner of the Estate, the said firm agreeing to advance him $15,000 to make up the deposit money and also to make the necessary outlay for working the Estate for two years. The crop of 1866 was a fair one, but the next crop was very deficient, and at the date of his application to the Court, in December last, the debt due to the Merchants who had made the advances amounted to $30,000 and the Petitioner was, besides, indebted in a sum of $8,000 to another party who had given him assistance for carrying on the Estate, after his first supporters had withdrawn. The total debts in the Balance-sheet are $92,288, while the only assets therein mentioned is the Estate *Beaux Songes* which is made to figure at the estimated value of $100,000; but it was lately sold and fetched only $25,000, an amount not nearly sufficient to pay the mortgages upon it.

W. NEWTON, for the official and trade assignee

ditors, contended that the approbation for *Bonorum* should be dismissed. The Petivith his very limited means ought never to rchased such an Estate.

with the assistance that he got from a ge creditor, to make the deposit and work ate for a time, the chances of success were sperate; besides we see that the Insolvent ly get those advances and the assistance of party who also lent him money, by pay-e sums to third parties by whose good those advances were procured. There is here of *bonâ fides* and unavoidable mis-, and it is alone to cases of that nature s form of proceeding by *Cessio Bonorum* is le. Besides, the conduct of the Petitioner very bad in various other particulars. been living all along, as he himself ad-the rate of $600 a month, for his private ture.

ore he left the property he swept off all the and cows, some of the mules, all the tools the workshop and a large quantity of wood, aving a perfect wreck behind him.

He says he expended money in paying the laborers and keeping up the Estate, but he has failed to shew by any proper evidence that he did so. He was formerly an Insolvent, but he can't tell us when that took place or what his debts then amounted to, and he says he then owed his wife $12,000, the exact sum still due to her, although he alleges that she has made large advances in possession of *Beaux Songes*; but of this no evidence whatever is produced. We altogether oppose the granting of this Petition:

G. GUIBERT, for the Petitioner: "My client and the parties who advanced money to enable him to make the deposit and carry on the Estate, did nothing more than enter into a speculation which has unfortunately not succeeded. He was no worse than the others. This happens every day. The first crop was good enough; but the second was a short one, and the Petitioner was turned out of possession and another manager put on the Estate, and then he was abandoned by his first supporters. A second came to his aid; but in November last, he also withdrew, leaving the Petitioner to carry on the Estate, as he best could, without any assistance. It was then that he was driven to sell off the oxen to support himself and keep up the Estate.

There was certainly some extravagance in his living, but he had a wife and a child to support, and was in bad health and obliged to live in Port Louis, for, though he was really the proprietor of *Beaux Songes*, he was not allowed to remain on the Estate.

I submit that he is entitled to succeed in the present application, at least to the extent of being protected from imprisonment."

THE COURT:

This case presents several features of a special and peculiar nature, and which are, certainly, very unfavorable to the Petitioner. It has been

argued on his behalf that, after all, he only joined other parties in the speculation of carrying on this Sugar Estate, and if the speculation was unsuccessful, why should he suffer more than the other associates who were equally foolish and rash in entering upon such an enterprise? But this reasoning is not satisfactory. The other parties were persons of substance who have honored all their obligations. They have paid cash down and have not caused loss to any one. They do not require to come to a Court of Insolvency to give an account of their conduct and of their dealings and ask its protection if the Court shall be satisfied that they have acted, all along, with good faith and been the victims of misfortunes beyond their own control. The position of the Petitioner is exactly the reverse of all this: with a very limited capital he undertook very heavy responsibilities. He put himself forward as the purchaser of a large Estate, while he was the owner, merely, of a few thousand dollars. From the beginning of the adventure, he was in such a state of indebtedness that any prospect of any making good his position can scarcely be said to have been within the remotest probability.

But, farther, the expensive style of living in which he indulged was quite unwarrantable in the circumstances.

He admits that he spent, monthly, for his private purposes some $600. He says, no doubt that his wife contributed from her funds. But he furnished no evidence of this, he could not even say what property she possessed, nor what amount was advanced by her. Latterly, he stripped the Estate of almost every thing upon it. He sold off nearly the whole of the oxen and cows, some 70 or 80 in number. Before he left the property he sent away a wooden house in the course of erection. Its value may not have been very great, as the wood was not new; but the dimensions of the building were 40 feet in length by 18 in breadth with a height of 8 feet, and five or six carts were required to transport the wood from the estate. At his departure, the property was denuded of almost every thing which could be removed. In the words of the manager who was put upon the Estate when it was placed under sequestration, " when I went upon the Etate " I found it entirely divested of provisions, tools " and animals. "

Unfortunately for the Petitioner he cannot give any proper account, of what he did with the money raised in this irregular and unwarrantable manner. He kept no Bank account, no cash book, and no record of any part of his expenditure, excepting of some of the payments made to the laborers. In such a case, the Petitioner cannot be said to have been in good faith throughout and to be reduced to his present position by misfortunes beyond his own control.

The benefit of Cessio Bonorum cannot be granted to him, and the Petition must be dismissed.

BAIL COURT.

ACTION EN DOMMAGES ET INTÉRÊTS POUR POURSUITE MALICIEUSE,—MOTIF PROBABLE ET RAISONNABLE,—INCONDUITE DU PLAIGNANT DANS UN PRÉCÉDENT PROCÈS,—REJET.

L'acquittement du Plaignant, (antérieurement prévenu de vol devant une cour correctionnelle) ne lui donne pas infailliblement droit à des dommages et intérêts, lorsque, surtout, il a, en quelque sorte, provoqué, par certains actes répréhensibles, l'action correctionnelle déjà dirigée contre lui.

ACTION IN DAMAGES FOR MALICIOUS PROSECUTION,—REASONABLE AND PROBABLE CAUSE,—PLAINTIFF'S MISBEHAVIOUR IN THE FORMER ACTION,—DISMISSAL.

The acquittal of a Plaintiff (previously Defendant in an action of Larceny) is by itself no ground for a suit in damages at his instance; specially when such Plaintiff had been guilty, in such former action, of gross misbehaviour.

PAVADÉ,—Plaintiff,

versus

KOO-MOOTOOSAMY,—Defendant

Before:

His Honor SIR C. F. SHAND, Chief Judge.

E. BAZIRE, —Of Counsel for Plaintiff.
J. MERCIER, —Plaintiff's Attorney.
P. L. CHASTELLIER,—Of Counsel for Defendant.
A. PITOT, —Attorney for same.

2nd July 1869.

This was an action of damages for malicious prosecution. The Plaintiff asked £100 as reparation for the injuries which he said he had sustained by a false charge of larceny of 1,000 vacoa bags, preferred against him by the Defendant, on the 26th August last, by signed Information before the District Magistrate of Port Louis. The Plaintiff alleged that the charge of larceny was got up against him by the Defendant, falsely and maliciously, and without any reasonable or probable cause.

It appeared from the evidence, that in the month of August last, 1,000 vacoa bags had been shipped at Savanne, on board of each of the two coasters *Cécile* and *Ste Françoise* which left Souillac at the same time, bound to Port Louis. On the morning of the 25th, both vessels had reached their destination, and the Plaintiff went to Duchesne the Captain of the *Cécile* and told him that he expected 1,000 vacoa bags from Savanne, and wished to know if he had them on board of his coaster. For reasons which have not been

very clearly explained, Duchesne, while he told the Plaintiff that he had such a quantity of vacoa bags in his ship, did not ask him to go on board and see whether or not they were the bags he was in quest of. He recommended him to go to the other coaster, Captain Vallet, and inquire if the bags he was looking for were not the bags which formed part of its cargo.

The Plaintiff went, accordingly, and spoke to Captain Vallet. What passed on this occasion between the parties is very material for the decision of the present case. Vallet deposes on oath as follows :

" On my arrival at Port Louis, at about 6 " o'clock A.M, on a Wednesday in August last, the " Plaintiff, at about 7 o'clock, came and asked " me if I had 1,000 vacoa bags on board.

" I said yes. He said they have been sent to " me by my " confrère " at Savanne. I have just " seen Duchesne who says you have my vacoa " bags ; please deliver them to me, for I have a " letter from my friend who says he has sent " them to me. He the Plaintiff shewed me a let- " ter. I can't read. I believed him. I asked " his name, he said I am Mootoosamy ; these bags " are consigned to me. I did not, then, know ei- " ther one or other of the Plaintiff or Defendant. " I told him I could not immediately give deli- " very, as the coaster was loaded, but to return " at 9 o'clock when, upon payment of the freight, " I would deliver them. This was done accord- " ingly."

Next day, one Vythilingum who had shipped the bags at Savanne, on board of the *Ste. Françoise*, Captain Vallet, came to town and went to the ship to enquire about them. He was then informed by Vallet of what had taken place, and he and Vallet went in quest of the Plaintiff, and soon found him in the town. He admitted the receipt of the bags, but pleaded that if they really did not belong to him he had merely committed a mistake in taking delivery of the wrong bags. The Defendant, who, by this time, had joined the party, required him to restore things to their proper and original position by replacing his bags on the quay whence he had taken them ; but the Plaintiff refused to do this, unless the freight and cartage were repaid to him.

Some high words then followed between the parties and they separated in very bad humour ; the Defendant threatening that he would prosecute the Plaintiff as a thief, the latter telling him that he might do as he pleased.

The Defendant, the same day, lodged a complaint of larceny of the bags against the Plaintiff. The latter was tried before the District Magistrate and acquitted with costs. It is for this prosecution as malicious and without reasonable or probable cause, that the present action in damages has been raised. The Defendant has admitted the Information in the Court below, the acquittal and the identity of the parties. This has rendered the production of the Record in the District Court, unnecessary, for, the testimony of the witnesses in the one case could not be used in the other.

We have now to consider, whether, looking at the case in all its features, the Plaintiff has been able to establish the two matters which must be proved to exist in all cases of this nature, viz : that the proceedings taken against him were founded in malice and were devoid of reasonable or probable cause. It has been suggested on behalf of the Plaintiff that the Defendant's motive was the malicious one of damaging and perhaps ruining the character of a rival dealer in vacoa bags ; but the fact of both the parties here being in the same line of business, is plainly by itself far too narrow a basis to support a charge of malicious prosecution.

On the other hand, if the evidence had disclosed nothing more against the present Plaintiff than that by what might reasonably have been held to be an innocent mistake he had taken possession of a quantity of vacoa bags which did not belong to him, it certainly would have been a very strong thing for the present Defendant, if, instead of resorting to Civil proceedings he had lodged a criminal Information against the Plaintiff, for larceny of the bags and caused him to be subjected to a public trial for the alleged offense.

But, unfortunately for the Plaintiff, there is evidence of very gross misbehaviour on his part, before the charge of theft was prefered against him. He undoubtedly obtained delivery of the bags by false pretences and by passing himself off for another party. He told the captain of the coaster *Ste. Françoise* that he had a letter from the shipper at Savanne, stating that the bags had been shipped for him, on board that vessel, and he showed a letter in support of his false statement. The witness not being able to read, could not, at the moment, check the *bona fides* and veracity of Pavadé, who, farther, added another falsehood by stating that he was Mootoosamy to whom the goods were sent. Thus, in fact, personating another and an absent individual, viz : the Defendant. Keeping this evidence in view, it is impossible to hold that the hands of the Plaintiff were clean in this affair. For some reason or other, he made false statement, that he might obtain possession of the vacoa bags on board the coaster of captain Vallet. When the truth subsequently came to light, after a wrangle about the terms on which the bags were to be restored to their real owner, the Plaintiff still insisted upon some trifling but inadmissible conditions, and in a manner, as we have seen, set the Defendant at defiance. In this state of matters it cannot be held that in lodging a charge of larceny against the Plaintiff, the Defendant acted with malice and without any probable or reasonable ground for the accusation.

The acquittal of the Plaintiff is, by itself, of course, no ground for a suit in damages at his instance against the Defendant. If the contrary were to be the rule of law, there would just be as many suits in damages as acquittals. The Plaintiff had really himself to blame. He exposed himself to the risk of the evil of which he complains, by his duplicity and false statements, and he must take the consequences.

The action is dismissed with costs.

BAIL COURT.

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APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT.—ACTE D'ACCUSATION.—OMISSION D'UN MOT ESSENTIEL DANS LA COPIE DE CET ACTE,——DÉNOMINATION INEXACTE,—RENVOI DEVANT LE MAGISTRAT DE DISTRICT,—VOL, —RECEL, —FRAIS.

L'énonciation, dans la copie de l'acte d'accusation, d'un crime différent, et l'omission dans la copie de ce même acte d'un mot essentiel et constitutif de ce crime, ne sont pas des moyens d'appel valides, lorsque ces erreurs n'auront pu entraver la libre défense du Prévenu.

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APPEAL EROM CONVICTION OF DISTRICT MAGISTRATE, - INFORMATION,—OMISSION IN THE COPY THEREOF OF A SUBSTANTIAL WORD,—ERRONEOUS HEADING,—REMIT TO THE MAGISTRATE, —LARCENY,—UNLAWFUL POSSESSION,—COSTS.

The Court will not quash a conviction, on appeal, because the copy of the Information sent up to the Court was defective and its title erroneous, the body of the original Information being correct and complete. Specially when the Prisoner suffered no hardship or impediment in his defence.

—

SIGOBEEN,—Appellant,

versus

THE QUEEN,—Respondent.

—

Before :
His Honor SIR C. F. SHAND, Chief Judge.

—

A. LALOUETTE, —Of Counsel for Appellant.
G. LALANDELLE,—Appellant's Attorney.
E. J. LECLÉZIO,—Of Counsel for Respondent.
J. BOUCHET, —Respondent's Attorney.

—

2nd July 1869.

This was an Appeal from a sentence of the Acting District Magistrate of Grand Port, sitting on the Criminal side.

The charge against Sigobeen was that he had been found unlawfully in possession of certain Indian gold and silver ornaments, which had been stolen from one Booduah, some time previously. The accused was found guilty and sentenced to six months imprisonment, with hard labor, and three shillings of costs. He appealed to the Supreme Court.

In the course of the discussion in the Court above, it was pointed out that in the copy of the proceedings sent up from the District Court, the word *excuse* did not appear in that part of the *charge against the Prisoner*, which stated, or ought to have stated, that he was in possession of the articles, " without sufficient excuse or justification. " It was also shewn that at the top of the charge itself, which, as we have seen, was for being in unlawful possession of certain articles previously stolen, the words, " charge of Larceny " were placed.

After hearing Counsel on both sides, the case was remitted to the Court below " for explana- " tion as to whether the word *excuse* which is " omitted on the copy, appears in the Original " Information ; and 2ndly why the heading : " *charge of Larceny* was put upon a charge for " receiving stolen property ? "

To this remit the Acting Magistrate made the following return : " I beg to state : 1st That the " word " excuse " which is omitted in the copy of " the Information in the case of *Sigobeen*, appeared " in the Original Information ; and, 2ndly, that " the heading : " charge of Larceny " was erro- " neously put, by the Inspector of Police, upon a " charge for receiving stolen property, instead of " the heading : " charge for receiving stolen " property."

LALOUETTE for the Appellant resumed his argument and mentioned that altho' after the return of the Magistrate he must give up his objection on the ground of the omission of the word *excuse* in that part of the original Information which charged the possession of the stolen property " without sufficient justification or excuse, " yet, the other difficulty still stood in the way of the Crown ; viz : that the Information was erroneously entitled " charge of Larceny ", whilst it really was a charge of " unlawful possession."

He farther argued that from the dates mentioned in the record as sent up from the District Court, it might be gathered that there had been two Informations, in fact, although only one of them was made to figure in the Record, and that the Prisoner must have suffered in his defence from such uncertainty in the proceedings.

E. LECLÉZIO, *Sub. Procureur General* : The omission of the word " excuse, " merely occurred in the copy of the Information sent up to this Court. The original was all right. In the next place it was a mistake, no doubt, to head an Information for receiving stolen property with the words " charge of Larceny " ; but no harm came of this blunder of the Prosecutor, who was the Superintendent of Police. There is no reason to believe that there were double Informations here or that the whole proceedings were not fair and regular.

THE COURT.

From the return of the Acting District Magistrate, under the remit from this Court, it appears that in two matters there has been some carelessness and negligence in the Court below. In the copy of the original Information sent up to this Court, a very important word in the body of the information ; viz : the word " excuse " was omitted, and again, we find quite an erroneous title placed, or, at least, allowed to remain at the

top of the original Information, when it ought to have been carefully deleted.

I trust the officials in the Court below will be more careful and accurate for the future, as a very little more would have led to the upsetting and quashing of the whole proceedings.

As the matter actually stands, and being satisfied that the Prisoner suffered no hardship or impediment in his defence, the *body* of the original Information being correct and complete tho' its title was erroneous and the copy sent up to this Court defective, and being farther satisfied that the accused was properly tried and proved, by sufficient evidence, to have committed the offence with which he was charged, I must dismiss the Appeal, but in the circumstances, without costs.

BAIL COURT.

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE,—RECEIVER OF STOLEN GOODS,—EVIDENCE OF COACCUSED,—ACQUITTAL,—CONVICTION,—COSTS.

The evidence of a coaccused against his accomplice, cannot be admitted until he be acquitted or convicted.

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—RECEL,—TÉMOIGNAGE D'UN COACCUSÉ,—LIBÉRATION,—CONDAMNATION,—FRAIS.

Le témoignage d'un coaccusé contre son complice, ne peut être reçu, si le déposant n'a, auparavant, été acquitté ou condamné.

SINNEVASSEN,—Appellant,

versus

THE QUEEN,—Respondent.

Before

His Honor Sir C. F. SHAND, Chief Judge.

T. HERCHENRODER,—Of Counsel for Appellant,
E. PELLEREAU, —Appellant's Attorney,
E. LECLÉZIO, —Of Counsel for Respondent
J. BOUCHET, —Respondent's Attorney.

2nd July 1869.

In this case the Appellant Sinnevassen had been charged in the District Court of Grand Port, with being in possession, in the month of August last, and without sufficient excuse or justification, of certain " Bons " and other property which had, some days previously, been stolen from one Sinnevassen Chetty.

The accused was convicted by the Acting District Magistrate and sentenced to 6 months imprisonment with hard labor, and £5 of costs.

Among the grounds of appeal to the Supreme Court, appeared the following reason : " The deposition of Clara Edmond Bon should have been rejected, she being a co-accused not acquitted and not convicted. "

It was shewn in the discussion before the Bail Court, that the said Clara and Sinevassen (the Appellant), had been charged with drugging and larceny ; but before proceeding with the trial of the Appellant for being in unlawful possession of the Articles aforesaid, the Inspector of Police had moved the Court " that the charge against Sinevassen and Clara, for drugging and larceny, be struck out " and the motion had been granted by the acting Magistrate.

In this Court it was contended, as above mentioned, that the statements of Clara could not be admitted in evidence as she had neither been acquitted nor convicted. A remit was made by the Judge in the Bail Court to the Judge below, that he should state whether by ordering that the charge against Sinnevassen and Clara for drugging and larceny " be struck out " he meant that the charge was dismissed and the prisoners acquitted. The return by the Magistrate was that by those words he did intend to decide that the charge was dismissed and the prisoners acquitted. Thereupon the Appellant's Counsel left the case in the hands of the Court.

THE COURT :

The form of expression used by the Magistrate, here, was ambiguous. As his intention was to acquit the prisoner, he should have said so distinctly and in the usual appropriate terms. It is not safe to depart from the ordinary technical words ; more particularly in Criminal matters.

The appeal is dismissed, but without costs.

BAIL COURT.

OUVERTURE DE CREDIT,—BALANCE DE COMPTE COURANT, – INTÉRETS.

Les intérêts son dûs de plein droit sur toute balance de compte courant, à partir du jour de la clôture de ces comptes.

OPENING OF CREDIT,— BALANCE OF ACCOUNT CURRENT,—INTERST THEREON.

Sums the balance of an account current, carry interest from the day on which such account have been finally closed.

BAUDON,—Plaintiff,

versus

CARBONEL, PIDDINGTON & Co.,—Defendants.

Before
His Honor Justice N. G. BESTEL.

—

L. ROUILLARD,—Of Counsel for the Plaintiff,
E. DUCRAY, —Plaintiff's Attorney,
W. NEWTON, —Of Counsel for Defendants,
E. SAUZIER, —Defendants' Attorney.

—

2nd *July* 1869.

The Plaintiff had opened a credit and debtor account with the Defendants who were allowed to draw upon him for wants of their Engineering establishment, on the terms stated in the power of Attorney given to one Dumat by Piddington, a member of the firm "Carbonel Piddington & Co."

The account begins on the 28th November 1866 and ends on the 31st January 1867, leaving a balance of $389.09. against the said firm which has paid certain sums on account. Whereby the above balance has been reduced to the sum of $108 in principal.

On action brought, this balance was paid into Court, but was not taken out by the Plaintiff, by reason of its insufficiency owing to the absence of the interest claimed by the Plaintiff, but denied, by the Defendants, to be due.

The only point to be ascertained is whether interest is due or not and should have been paid into Court along with the principal.

The Defendants ground for refusing to pay interest is that none can be due to the Plaintiff who might have been paid long ago had he been so minded. That he not having been paid thro' his own fault in having claimed a larger sum than was really due to him, must necessarily submit to the loss of interest now claimed.

The answer to this plea was, true it was that a larger sum had originally been claimed by error, but, at the opening of the trial, the error was frankly admitted by the Plaintiff who, unhesitatingly, reduced the sum originally demanded to its present figures. The Defendants might, therefore, have added the interest on the reduced principal to the sum paid into Court, and the Plaintiff would not have been warranted, as he was, to claim the now disputed interest. "Du reste," says "PARDESSUS (*Droit commercial*, "2 p. 527), les comptes (courants) portent in-"térêts de plein droit, parceque les correspon-"dants sont respectivement mandataires."

JUDGMENT.

When this case came for trial, the error committed by the Plaintiff, in claiming a larger sum than the one really due to him, was admitted.

The Defendants remained debtor of a smaller sum which, however, was not paid. This non payment compelled the Plaintiff to bring his action for the recovery thereof On action brought, the Defendants paid, into Court, the amount of their debt as reduced in principal only. Nothing was paid in on account of interest. The reason assigned for their not paying such interest was the error originally committed by the Plaintiff in demanding a larger sum than was due. This, however, is no argument for not paying interest on the minor sum due, the amount of which had been made known to them.

They have enjoyed the Plaintiff's money up to the time they paid the reduced principal into Court. It is but fair that the Plaintiff should be indemnified for the enjoyment the Defendants have had of his principal, by interest now claimed from the day of trial, when the error committed was acknowledged into Court.

Judgment for Plaintiff, with costs.

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SUPREME COURT.

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PROPRIÉTÉ SUCRIÈRE ADMINISTRÉE PAR LE COMMISSIONNAIRE,—ACTION EN DOMMAGES ET INTÉRÊTS A LA REQUÊTE D'UN CRÉANCIER.

Le créancier inscrit sur une propriété sucrière, qui est intervenu dans un acte d'ouverture de crédit, pour consentir à ce que les sucres soient consignés au bailleur de fonds, ne peut, si ce dernier prend ensuite l'administration de la propriété et laisse péricliter le bien, attaquer le Commissionnaire, en dommages et intérêts.

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SUGAR ESTATE MANAGED BY A "COMMISSIONNAIRE,"—ACTION IN DAMAGES AT THE INSTANCE OF A CREDITOR.

The creditor inscribed on a Sugar Estate, who has intervened in a deed of opening of credit, in order to consent to the sugars being forwarded to the "Commissionnaire" money lender, cannot if the latter, afterwards, assumes the management of the Estate and allows such Estate to go to ruin, enter an action in damages against the "Commissionnaire."

—

LEWISON,—Plaintiff,

versus

THOMAS, LACHAMBRE & Co.—Defendants.

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Before:

His Honor SIR C. F. SHAND, Chief Judge, and
His Honor N. G. BESTEL.

—

G. GUIBERT, —Of Counsel for Plaintiff.
J. SLADE, —Plaintiff's Attorney.
Hon. L. ARNAUD,—Of Counsel for Defendants.
J. PIGNÉGUY, —Defendants' Attorney.

—

26th May 1869.

By a Notarial contract of the 10th January 1860, duly registered, one Damare Amédée Perrot let, to one Victorien Lamarque and one Joseph Isaac Cohen De Lissa, a Sugar Estate *Le Nuage* alias *Chamarel*, in the District of Black River, for six years and three months reckoning from 11th January 1860, to end on the 31st March 1866, such lease renewable for six other years on the same terms on notice being given to the said Perrot, one year before the last mentioned date.

One of the several conditions of the lease above mentioned was the annual consideration of 160,000 pounds weight of sugar of the first quality, manufactured on the said Estate, to be delivered to the said Perrot, in two instalments of 80,000 pounds weight, on 1st November and 15th January of each year, under the penalty of the cancellation of the said lease, for non payment of the rent, after a *mise en demeure* remaining unheeded for three months after service thereof.

By a subsequent agreement under private signatures, of the 5th June 1860, the said Victorien Lamarque assigned his share in the lease, to De Lissa, and by a notarial deed before Raoul, of the 22nd February 1864, duly registered, De Lissa sole lessee of the said Estate, ceded and conveyed to one James Blackburn, ½ of all his rights, claims and charges arising from the above mentioned lease, from and after the 16th January 1864.

For and in consideration thereof, the said Blackburn bound himself to pay in discharge of the said De Lissa, the sum of $10,000 to Lewison, the Plaintiff, a creditor of the said De Lissa, on the portion accrueing to him, Blackburn, in two equal instalments of $5,000 on the crops of 1864 to 1865 and of 1865 to 1866; and the said De Lissa, further abandoning to Lewison that portion accrueing to him, until the Plaintiff should have been paid the sum of $17,589 due to him.

Blackburn and De Lissa further bound themselves, jointly and in solido, to pay to Lewison, the sum of $100 per month from the 17th February following and to be deducted from the interest of the claims aforesaid, on payment of which said $100 during the partnership between Blackburn and De Lissa, the Plaintiff undertook not to interfere in, nor impede the working of the said Estate or the consignment of the produce thereof to any agent or agents.

It is further acknowledged by Blackburn and De Lissa, in the said deed of partnership, that the machines &c., set out in an inventory to the contract annexed, were the property of the Plaintiff and should become the property of the partners on a cash payment of $11,720.

By an act under private signatures, to which Pierre Jules Levieux, the proxy of the said Perrot and wife, as well as George Lewison the Plaintiff, were made intervening parties, it was agreed, among other things, that all the sugars manufactured on the Estate should be sent to Port Louis to Messrs Thomas, Lachambre and Co., represented by Arsène Maroussem, of Port Louis, Merchant, who bound themselves to store the same at the "Albion Dock," at the expense of the said Blackburn and De Lissa, to sell the same, except the quantity of 160,000 pounds weight which was to be delivered to the lessor Perrot or Agent, on the wharf, in terms of the conditions of the said lease.

The Plaintiff complains that the said Defendants on or about the latter end of the year 1864, had improperly and without the consent of the said De Lissa or of the Plaintiff, had prevailed upon Blackburn to confide to them the administration which had been entrusted to him, Blackburn, personally, by the partnership conventions, and had assumed the entire control, supervision and management of the said Estate *Chamarel*, which administration by them or their agents had entailed heavy losses upon the Plaintiff, and the following among others:

1st. The bullocks and mules, for the reasons assigned in the Declaration, for the most part have died, and the rest had been much deteriorated in value.

2. The rent of the landlord being unpaid altho' sufficient sugars had been sent to the Defendant for paying the same, Perrot caused the lease of the said Estate to be cancelled, and to be paid of his rent, had seized and sold all the mules, carts, implements generally whatsoever being on the said Estate, as well as the machinery and utensils belonging to the Plaintiff, and by him lent, as aforesaid, to the said Blackburn and De Lissa, for which wrongs, $15,000 plus $50 costs of Declaration and service, giving a total of $15,050 are claimed as a reparation for the wrongs which the Plaintiff alleges to have sustained at the hands of the Defendants. The Defendants, in their plea, 1o deny the various matters, facts and things in the Declaration alleged; the capacity of Plaintiff to bring any action in damages or otherwise against the Defendants, by reason of the alleged facts in the Declaration set forth which have already been the subject matter of 2 laid suits now or lately pending before this Court between the parties therein mentioned, of which suits the Plaintiff had full knowledge and notice, or by reason of any other facts or matters whatsoever connected with the *Chamarel* Estate;

3. Not guilty of the grievances or damage complained of; and finally, pray for the dismissal of the action. Thereupon issue was joined.

On the cause being called for trial, the Honorable L. ARNAUD, of Counsel for the Defendants, took a preliminary objection and contended that the Plaintiff had no right of action against the Defendants for the alleged non or bad performance of their contract with the lessees of the Estate *Le Nuage* alias *Chamarel*.

The Plaintiff was no party to the contract between the Defendants and the lessees of the said estate, in which contract not the slightest reference is made to the existence of any live stock, machinery &c., of which the Plaintiff alleges to have been deprived by the act and deed

of the Defendants in not paying to the landlord the amount of his rent, by reason of which Perrot cancelled the lease made to Blackburn and De Lissa, and for payment of his rent seized the live-stock and machinery put on the Estate and referred to a schedule annexed to the contract of the 22nd January, to which, however, the Defendants were no parties.

The Contract upon this action is based on the agreement in four parts signed by the Defendants Blackburn and De Lissa, and in which Levieux intervenes for the protection of the landlord's rights, and De Lissa for no other than the following purpose, as stated in the art. 13: "Au présent est aussi intervenu "M. Geo. Lewison, propriétaire, lequel après "avoir pris communication de ce qui précède a "déclaré avoir pour agréable les conditions qui "précédent et s'est obligé à n'en pas entraver "l'éxécution jusqu'à l'entier remboursement "des avances qui seront faites par MM. Thomas, "Lachambre & Co., en principal et intérêts."

The conventions to which the Plaintiff assents and undertakes not to disturb, relate to the advances to be made to Blackburn and De Lissa, for the wants of their estate, and the conditions connected with those advances and the refunding thereof. No reference is therein made to any live-stock, machinery &c, or to the schedule annexed to the contract of the 22nd January, mentioning such live stock, machinery &c.

G. GUIBERT for the Plaintiff, on the other hand, maintained that clause 9 of the agreement under private signatures between the Defendants Blackburn and De Lissa, was decidedly in favor of the right of action on the part of the Plaintiff. This clause provides for the sale of the sugars in payment of the debt of Blackburn and De Lissa to the Plaintiff, with the exception of the 160,000 pounds weight to be deducted in kind for their landlord Perrot, for rent. The net proceeds of the sale of the sugars were to be applied to the payment of the balance which might be due to the Plaintiff; and by clause 10 of the same agreement, any balance in favor of Blackburn and De Lissa, should be paid in two equal instalments. "Une moitié pour Mr Blackburn, "et une moitié pour Mr De Lissa; sur la ½ de "Mr Blackburn il sera versé à Mr Lewison une "somme de $5,000, avec les intérêts à 9 o|o "par an, et la totalité de la part de Mr De "Lissa sera versée à Mr Lewison." Counsel next called the attention of the Court to the fact of the agreement having been made in four parts, whence he inferred a recognition by the Defendants of the Plaintiff being a party to the opening of credit by Defendants to Blackburn and De Lissa. He also urged that altho' Blackburn was the party who was entrusted with the management of the estate, had either deprived himself or had been either induced and compelled by the Defendants to resign such management in favor of the latter who should have so managed the estate as to prevent the possibility of a cancellation of the lease and the seizure of the Plaintiff's property.

JUDGMENT.

We have in vain tried to find a plausible ground in support of this action. Not a word is said in the "ouverture" of credit by the Defendants to Blackburn and De Lissa, which might raise in the Defendants' mind, the least suspicion that the live-stock, machinery &c, then being on the Estate *Le Nuage* alias *Chamarel*, at the date of the "Ouverture de crédit," were not the property of Blackburn and De Lissa.

We have no evidence of the contract between Blackburn, De Lissa and Lewison, of the 22nd January 1864, to which a Schedule was annexed in support of the statement of Lewison, and recognition by Blackburn and De Lissa of the live-stock, machinery &c. therein mentioned being the property of Lewison, having ever been brought to the notice of the Defendants.

Further, the clauses 9 and 10 say nothing more than the Defendants were empowered to sell all the sugars of the Estate, with the exception, however, of 160,000 pounds weight to be delivered in kind to the landlord, in payment of his rent; that the net proceeds should go in payment of the Defendants' balance in favor of Blackburn and De Lissa, in the way above pointed out.

Assuming Lewison's intervention to have made him a party to the agreement or "ouverture de crédit" we find him approving the "ouverture de credit," the conditions consequent upon it and, inter alia, in which way matters were to be conducted between parties to secure to the Defendants payment of the advances to be made by them. The Plaintiff further consents to be paid upon the eventuality of an existing balance in favor of Blackburn and De Lissa, in the manner stated in the agreement "après avoir pris com-"munication de ce qui précède a déclaré avoir "pour agréable les conventions qui précèdent et "s'est obligé à n'en pas entraver l'éxécution jus-"qu'à l'entier remboursement des avances qui "seront faites par MM. Thomas, Lachambre "& Co., "en principal et intérêts." Not a word is there of Lewison's right to the live stock, machinery &c. being on the Estate. The admission of Blackburn and Delissa could only be binding on the Defendants if they had been brought to their notice, or, had reference been made to the deed of the 22nd January 1864, in the "ouverture de credit." Neither of these hypotheses has been realized.

But it has been said that the assumption of the administration by the Defendants rendered them liable to the Plaintiff, there being ample evidence of the damage complained of by the Plaintiff, being the immediate consequence of their mal administration, assuming such maladministration, the Defendants might be called to account by the lessees Blackburn and De Lissa who, so far as the Defendants were concerned, were the sole lessees and owners of all live-stock, machinery, being on the Estate, at the date of the "Ouverture de Crédit." That the Plaintiff should have a right of action against them, he ought to have been able to shew that the Defendants had knowledge of the live-stock, machinery &c, being his, the Plaintiff's property.

He has failed in this proof. The consequence is that the action must be, and is accordingly dismissed with costs.

SUPREME COURT.

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ASSURANCE CONTRE L'INCENDIE,—BATIMENTS INCENDIÉS PAR MALVEILLANCE,—INTENTION CRIMINELLE ET FRAUDULEUSE DE L'ASSURÉ,—PREUVES,—ACTION EN PAIEMENT CONTRE LA COMPAGNIE,—REJET.

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FIRE INSURANCE,—BUILDINGS PURPOSELY SET ON FIRE,—INSURED GUILTY KNOWLEGE AND FRAUD,—EVIDENCE (DIRECT AND CIRCUMSTANTIAL),—WITNESSES' VERACITY,—OATH AND SOLEMN AFFIRMATION,—ACTION IN PAYMENT AGAINST THE COMPANY,—DISMISSAL.

—

VIRAPA AND WIFE,—Plaintiffs,

versus

THE MAURITIUS FIRE INSURANCE CY.,
—Defendants.

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Before:

His Honor N. G. BESTEL, and
His Honor G. B. COLIN.

—

E. PELLEREAU,—Of Counsel for Plaintiffs.
J. MERCIER, —Plaintiffs' Attorney.
G. GUIBERT, —Of Counsel for Defendants.
J. PIGNÉGUY, —Attorney for same.

—

4th July 1869.

A Policy of Insurance bearing the No. 12,953 under date the 17th September 1867, shews that the above Company had insured for one year, from the 17th September 1867, aforesaid, at noon, and ending on the 17th September 1868, certain buildings erected on a plot of ground belonging to Virapa the wife, situate at Port Louis, Pagoda street, No. 35, were insured against the risk of fire. The buildings insured were, amongst others:

1o. A dwelling house in wood, covered with shingles, valued at and insured for...	$1,800
2o. A kitchen built in wood, doubled and covered with galvanized sheet iron, valued at and insured for	50
3o. A pavilion in wood, covered with tin, valued at, and insured for	200
4o. A kitchen and an outhouse in wood, covered with tin, valued and insured for	200
	$2,250

On or about the 27th June 1868, at about 10 o'clock at night, a fire broke out on the said premises of Joseph Virapa the wife, and the four buildings above described were totally des by the said fire, and the damage thereby s by the said Virapa the wife, amounted, acc to the valuation made by the Mauritius F surance Company, to the sum of Two th two hundred and fifty dollars.

In compliance with Art. 16 of the Pc Insurance, the Plaintiff Virapa the wife, the declaration required by the said Articl

But the Defendants have not, up to th of the declaration, paid the said sum of $ nor rebuilt the house and outhouses des by fire, altho' four months have elapsed sir said fire, and altho' often requested so A declaration by the said Joseph Virapa, on behalf of his wife, made on the back said Policy of Insurance, on the 30th Sept 1867, shewed that a sum of $425, out amount of the said Policy of Insuranc transferred and assigned to one Jacques Isaïe Avrillon, which transfer and assig was registered at the office of the Defenda the 21st October 1868, No. 2,204, and re null and void by payment to the said A by Virapa and wife, of the said sum of $4

But another declaration made by Josep rapa, for and on behalf of his wife, on the September 1867, duly registered at the o the Defendants, on the 21st October 186 2,205, shewed that the said Policy of Ins was assigned and transferred to the sai rillon, up to the sum of $900 in which th Virapa the wife was indebted to the sai rillon; which transfer and assignment good, the Defendants not having satisfie Plaintiffs in any manner.

The Plaintiffs, therefore, demand Jud against the Defendants and pray that the be condemned to pay to the said Virapa th the sum of $2,250, that is to say a sum of into the hands of Virapa the wife, and t $900 into the hands of the said Avrillon, t signee of a similar sum, as above expl together with interest on the said sum of $ at the rate of 9 0[0 per annum, and the co suit.

The Defendants, in answer to the above ration, pleaded several pleas: 1o. No ri action. 2o. Not indebted, and 3o. That the ings in the Declaration mentioned, had be sured against the risk of fire breaking out dentally, and that the fire in the Declaratic ferred to, was not such an accidental fir that the said buildings were purposely s fire for the purpose of defrauding the Defen and 4o. That the said Virapa the wife had ledge of the fact that the said buildings we be set on fire for the purpose of defraudin said Defendants, and that she did nothing t vent the same from being so set on fire; an the said buildings were burnt and des owing to the fault, negligence and fraud Plaintiffs.

The Plaintiffs replied and denying the cious, false and defamatory matters in the Nos. 3 and 4, prayed that in conformity

Art. 299 of the Penal Code, the Court, in giving Judgment on their behalf against the Defendants, on the Plaintiffs' action,do order that the said 3rd and 4th pleas be suppressed and struck out and to condemn, moreover, the said Defendants to pay to Plaintiffs a sum of £500 as damages, besides the sum in the Declaration demanded.

In their Rejoinder, these additional conclusions have been totally disregarded by the Defendants who maintain their pleas 3 and 4, alleged by the Plaintiffs to be defamatory.

JUDGMENT.

This action is defended by *The Mauritius Fire Insurance Company*, upon very serious grounds. The pleas distinctly set forth that the fire which burnt down part of the premises insured, was not accidental, but took place with the Plaintiffs' knowledge, for the express purpose of defrauding the Company.

It is very plain that such a plea must be supported by very strong evidence in order to defeat the Plaintiffs' right arising out of her Policy.

The evidence adduced has been of a twofold nature : direct and circumstancial.

If the direct evidence is to be believed, there is no doubt that Mrs Virapa the Plaintiff, knew that her house was to be burnt down ; by whom and when it was to be burnt down.

There is no doubt, also, that if another hand committed the offence, it was for her private purposes that it was committed, and hers was the will that prompted and directed the deed.

The direct evidence has been much cavelled at, and there is no doubt that the witnesses who gave it are not of a class wh se veracity and whose memory can be much relied upon. The most important witness of all, was not produced before the Court of Assizes, when the Plaintiff was tried on a charge of arson, and acquitted ; and the reason why, is not explained in the evidence before us ; still, those witnesses are very positive ; there is no suspicion, that we can see, of their having the remotest interest to bring this charge and disclose the facts that they have revealed ; there is no suspicion that they have conspired together through malice or spite towards the Plaintiffs ; they speak to collateral facts which, if false, might have been proved false, and are left unrefuted.

Altogether, their united statements carry in the present instance great weight ; whether sufficient to bring conviction to our minds, if they stood alone, it is not necessary to inquire, because they do not stand alone, but are supported by circumstancial evidence of very great import. It is, really we think, very much to be regretted that the law should have taken away the best safeguards which can be relied upon, to hope for,if not to secure truth from most of the witnesses that are put in the box : the sanction of a solemn oath, the appeal of the Almighty to hear and receive the oath. We are fully aware that an oath may not be necessary for those whose education and sense of honor, fear of disgrace, detestation of that which is mean and low, are sufficient for the candour and truth of their statements ; and that such men exist in every country, under every religious system, we have no doubt ; but, unfortunately, the Hindoo and Mahometan immigrant coolies whom we hear as witnesses are not, generally at least,men of that description ; their moral, as well as their social position, stands very low, and to call facts by their true names, they often lie " *impudentissime.* " Now, these are the very people whose moral aberrations should be checked by the hopes and fears which their own religious creed inspires, and these are the very people from whom the influence of such hopes and fears is taken away. They are not sworn at all, they solemnly affirm ; what the affirmation is worth and what meaning the solemnity of the affirmation conveys to them, it is difficult to say ; the plain fact remains that the least educated, often the most superstitious are the very people who are called upon to give evidence without an appeal to the object of their worship.

This, however, being the law, we must take it, and apply it as we find it, and comparing the direct with the circumstantial evidence, we find that the latter supports the former.

The Plaintiff owed money secured on her house, and an attorney had received instructions to sue and eject her. The Plaintiff tried to raise money to pay off the pressing creditor, but failed. This, of course, *per se* would mean little or nothing ; if the rule of Beccaria has occasionally proved true, it has just as often proved false and oppressive ; but those are facts, and facts which the most respectable witnesses have laid before us. One of the direct witnesses, Mootoosamy, states that he was told by the Plaintiff to set fire to the house, and that he saw in the drawing room shavings of wood and gas oil ; a witness J. B. Wildman, who lives opposite the house, was awakened that night by a strong smell of petroleum oil, went out and saw smoke coming out of the Plaintiff's roof. He has no doubt at all as to the smell of the oil. Again, the day after the fire, the detective Inspector Boulter asks the Plaintiff whether she can account for the fire? no she said, we have lost a good deal of property. Now, that is completely false, and of that particular fact we have no doubt whatsoever, every piece of furniture had been removed from the house, Wilman saw that done ; Jumun who helped to carry the furniture out, and did so with Tamby the Plaintiffs' servant, is positive as to the fact ; Asselin proves it ; the other witnesses prove it too, " nothing was left " some of them say ; the removal by two men, lasted several days ; they took down even some windows that were in the loft.

Now, this removal of the furniture is, here, of very great importance ; Veerapa, the Plaintiff husband was ill from fever ; that is perfectly plain, Dr. Rogers puts the fact beyond dispute ; he leaves his house for a change, but he goes to reside at a short distance off in the same street; in malabar camp, at his nephew's residence, and yet not only is every bit of valuable furniture taken away, why and wherefore is not shown,

but every article that can serve is carried away, from the house that was burnt, to the nephew's house. There is more: it is distinctly shown by Made. Chavry, for instance, that the cows which were usually kept in a covered shed, but to leeward of the house, a shed which was in fact burnt down, were on the very day preceeding the fire, removed to windward, and left for the night in an uncovered shed and that was not burnt. The reason given is, that because the Plaintiff wanted to clean the shed, the cows were removed to the opposite side of the premises. We do not believe the reason alleged; we do not believe the removal of the cows to have been merely an awkward coincidence. One of the direct witness, Mootoosamy, states that money was given to Tamby, to drink, after he had received his orders to set fire to the house. If the circumstance stood alone, it might be certainly a mere coincidence, but Tamby was seen by other witnesses, drunk that night.

It is again shown that the Plaintiff tried not to learn from Appasamy what he would say, what he had seen or heard, so as to be prepared to meet honestly and explain every possible fact that would be adduced against her, but tried to induce the witness to prevaricate, and after the preliminary inquiry before the magistrate, she told the witness that Tamby had revealed every thing, asked him not to say any thing against her, and he would get a reward. She did not directly ask Mootoosamy to say nothing if called as a witness, but promised him also a reward for his silence generally, if she gained the insurance case. We reject the statement of Tamby before the District Magistrate. There is no sufficient evidence; it seems to us, that the words used by the Plaintiff in her conversation with Appasamy, amount to an admission that Tamby spoke the truth, and to import into a cause as evidence against a party an unsworn statement by another person, requires the clearest proof that the party against whom such statement is to be used, distinctly admitted the same to be true and knew well what the statement was in all its bearings when the admission was made. A contrary doctrine, bad in principle, would be practically fraught with danger. The evidence as to character, touching Veerapa, always most valuable in a doubtful case, does not touch the Plaintiff the owner of the house; it evidently was not Veerapa who was ill at the time, but Mrs Veerapa who, if the witnesses have made out the Defendants' case, was art and part in the facts complained of. All the circumstances above spoken of being viewed together, the false statement made and we must hold it to have been wilfully made to Boulter; the promises held out to witnesses; the strong smell of petroleum oil; the removal of the furniture; the shifting of the cows from the covered shed to leeward to the uncovered shed to windward; Tamby drunk that night; the house seized and the sale already advertized; the failure to secure a loan of money to pay off the debts, all those divers and collateral circumstances, of which no satisfactory or even plausible explanation has been given us, and which are proved beyond any reasonable doubt, confirm so positively the impression left in our minds by the testimony of the witnesses who speak directly of a fire purposely and deliberately set, or who, like Ramsamy, Alfred, and Appasamy speak of conversation which are little short of confessions, that we must come to the conclusion that the pleas ought to be sustained.

We must give Judgment for the Defendants, with costs.

SUPREME COURT.

APPEL AU CONSEIL PRIVÉ,—SENTENCE ARBITRALE,—RULE DE RÉFÉRENCE,—ORDONNANCE D'EXEQUATUR.

Lorsque la Cour a prononcé un Jugement rendant exécutoire une sentence arbitrale, ce Jugement de la Cour est susceptible d'appel au Conseil Privé, s'il réunit les conditions requises par l'Ordre en Conseil, quoique les parties aient, dans le compromis, renoncé au droit d'appel de la sentence arbitrale.

ORDER IN COUNCIL,—MOTION FOR LEAVE TO HER MAJESTY IN HER PRIVY COUNCIL,—AWARD OF ARBITRATION,—RULE OF REFERENCE,—EXEQUATUR.

When the Court has converted an Award of arbitration between parties, into a Rule, and ordered execution to issue on such Rule; and although the parties to the Rule of reference had bound themselves in all things to abide by such above Award; an appeal to Her Majesty in Her Privy Council will lie against such Judgment of the Court, if the case comes within the provisions of the Order granting such leave.

ROSTAND,—Appellant,

versus

BOULANGER,—Respondent.

Before:

His Honor SIR C. F. SHAND, Chief Judge, and His Honor N. G. BESTEL.

G. GUIBERT,—Of Counsel for Appellant.
E. DUCRAY, —Attorney for same.
E LECLÉZIO,—Of Counsel for Respondent.
G. RITTER, —Attorney for same.

1st *June* 1869.

This was a motion by G. GUIBERT on behalf of Rostand, for leave to appeal to Her Majesty's Privy Council, from a Judgment of this Court, given between parties, on the 10th December 1868, making a Rule of Court an award of Arbitration between parties, of the 25th July 1868, and ordering execution to issue thereon.

This motion was resisted by E LECLÉZIO Ju-

nior, on behalf of Boulanger. He contended that by the Rule of reference the parties thereto had bound themselves in all things to abide by, perform and fulfil, the award of the arbitrators, and that neither of them should prosecute any proceedings in error or prefer any bill in equity against each other for any matter relating to matters so referred on any or either of them, in particular on the said arbitration or award.

That in order to try the merits of the Judgment of this Court on appeal, the Court above would necessarily have to look into the merits of the award of the arbitrators which, though intended by the Rule of reference to be final, will, as a matter of fact, be subject to be reversed on appeal against the express letter and spirit of the rule. That the award had been submitted to this Court, not as a Court of Appeal, but for the sole purpose that it might be made a Rule of Court in order that execution might issue thereon; which execution the arbitrators had no power to order.

The answer to this reasoning was: The end contemplated by the Appellant was to submit to the criticism of the appellate Court, not the merits of the award, but of the *exequatur* allowed by the Supreme Court.

The Appeal is, in no wise, inconsistent with the undertaking of the parties that the award should be final and unappealable.

The argument on appeal may, very likely, compel the Court above to refer to the award, in order the better to test the correctness of the conclusions arrived at by this Court on the several heads referred to in the Judgment, but not otherwise. Any attempt to criticise the rule of reference or the award, except as to the points raised before this Court, can not fail being resisted on appeal.

Further, this Court has not to anticipate what may, or may not, happen on appeal.

Its duty is merely to ascertain whether this case comes or not within the provisions of the Order in Council for granting the leave prayed for.

JUDGMENT.

The conditions required for an appeal to Her Majesty's Privy Council, are: 1o That the Judgment of this Court be *final* or having the effect of a final and definitive sentence 2o That such Judgment be given or pronounced for and in respect of any sum or matter at issue *above the amount of* £1.000. 3o. That the party aggrieved do, *within fourteen days after* Judgment, apply for leave to appeal. 4o and do enter into good and sufficient *security* to the satisfaction of the Court, for the prosecution of the appeal and for the payment of the costs of appeal.

1o In this case the sum awarded to be paid by the appellant is $15.370 or £3.074. 2o the Judgment is final. The motion for leave to appeal was made within the fourteen days. 4o The security for payment of the costs of appeal have been furnished.

All the requisites required by the Order in Council, concurring in this case, the Court is under the necessity of granting the leave to appeal moved for.

Whether parties will be allowed on appeal to criticise the reference to or the award of the arbitrators on discussing the merits of the Judgment of this Court before Her Majesty's Privy Council, will be a fit and proper subject matter for the consideration of the appellate jurisdiction, but not for the consideration of this Court, whose duty after Judgment, is merely ministerial and not extending further than the mere ascertainment of how far the requisites for an appeal are or are not to be found in each case in which leave to appeal is moved for.

In granting execution upon the award of the arbitrators, we have overruled the objections of Rostaud. In so doing we may have erred, and he is justly entitled, under the circumstances, to submit our Judgment, to the review of a superior Tribunal.

Costs against Boulanger the Respondent.

SUPREME COURT.

PROPRIÉTÉ SUCRIÈRE,—SOCIÉTÉ CIVILE,—DISCORDE ET MESINTELLIGENCE ENTRE ASSOCIÉS,—VIOLATION DE CONTRAT,—RUINE IMMINENTE DE LA PROPRIÉTÉ,—ORDRE DE SÉQUESTRE,—INTERROGATOIRE SUR FAITS ET ARTICLES,—COMPÉTENCE DES TÉMOINS,—C.P.C. ARTS 268, 283,—DEMANDE EN DISSOLUTION DE LA SOCIÉTÉ,—C.C. ART. 1871,—JUGEMENT EN CE SENS.

"*La dissolution des Sociétés à terme ne peut être demandée par l'un des associés, avant le terme convenu, qu'autant qu'il y en a de justes motifs, comme lorsqu'un autre associé manque à ses engagemens, ou qu'une infirmité habituelle le rend inhabile aux affaires de la Société, ou autres cas semblables, dont la légitimité et la gravité sont laissés à l'arbitrage des Juges.*"

La Cour pourra, prenant en considération les termes absolus de l'Article 268 *du Code de Procédure Civile, et ceux facultatifs de l'Article* 283 *du même code, et d'après les circonstances particulières dans chaque cas, admettre ou écarter le témoignage des différens genres de témoins mentionnés dans ce dernier Article.*

SUGAR ESTATE,—CIVIL PARTNERSHIP FOR THE WORKING THEREOF,—DISCORD AND MISUNDERSTANDING BETWEEN PARTNERS,—VIOLATION OF COVENANT,—IMPENDING RUIN OF THE ESTATE,—ORDER OF SEQUESTRATION,—UNSWORN PERSONAL ANSWERS,—COMPETENCY OF WITNESSES,—C.P.C ARTS. 268, 283,—ACTION IN CANCELLATION OF PARTNERSHIP,—C.C. ART. 1871,—DECREE OF DISSOLUTION.

"*Dissolution of Partnerships for a term cannot be demanded by one of the Partners before the term*

agreed, unless for just motives, as where another Partner fails in his engagements, or that an habitual infirmity renders him unfit for the affairs of the Partnership, or other similar cases, the lawfulness and weight of which are left to the arbitration of Judges."

Art. 283 *C.O.P. being optional in its enactment, contrary to Art.* 268 *of that same code, which is imperative, the Court will, in consequence and according to the special circumstances attending each case, reject or admit the evidence of that class of witnesses enumerated in the above former article.*

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GALDEMAR FRÈRES,—Plaintiffs,

versus

WIDOW P. DIORÉ AND J. J. WILSON,—Defendants.

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Before:

His Honor N. G. BESTEL, and
His Honor G. B. COLIN.

—

P. L. CHASTELLIER,—Of Counsel for Plaintiffs.
F. VICTOR, —Attorney for same.
E. PELLEREAU, —Of Counsel for Widow Dioré.
E. LAURENT, —Attorney for same.
A. LEGALL, —Of Counsel for J. J. Wilson.
J. PIGNÉGUY, —Attorney for same.

—

10*th June* 1869.

This action was brought by the Plaintiffs to obtain from the Court, a decree dissolving the Civil Partnership entered into by the Plaintiffs with the Widow Pierre Dioré and Julius Josephus Wilson, for the working of a Sugar Estate named *Richfund* and situate at "La Brisée Verdière" in the district of Flacq. The Plaintiffs alleged that on the 28th October 1867, the Widow Pierre Dioré sold to Wilson, to Victor Galdemar and to Félix Galdemar, the two latter trading under the name and style of "Galdemar frères," four fifteenths of the aforesaid Estate, to wit: one fifteenth to Wilson, and three fifteenths to "Galdemar frères." That sale which was effected in virtue of a deed drawn up by Mr. Pelte, a Notary, was made for the sum of £45,333.33⅓ c.; of which sum, $11,333.33 c. was for the undivided 1|15th sold to Wilson, and $34,000 for the undivided 3|15ths sold to Galdemar "frères." The Plaintiffs also aver that the undivided 4|15ths sold as aforesaid, formed part of the 10|15ths of the said Estate sold previously by Wilson to the Widow Dioré, according to a deed of sale drawn up by Pelte, a Notary, and dated 6th July 1863, the said Wilson having, it appears, originally purchased the whole Estate when it was put up for sale at the death of the late Pierre Dioré, for the sum of £135,000, so that the several conveyances of divers portions of the said property from the sale to Wilson to the sale to Galdemar "frères" and Wilson, appear to have run thus:

1. *Fairfund* purchased by Wilson, alone.

2. On 6th July 1863, Wilson sells 10|15ths of *Fairfund* to Widow Dioré, and remains co-owner for 5|15ths.

On 28th October 1863 Widow Dioré sells 1|15th to Wilson and 3|15ths to Galdemar "frères," and the respective rights of the parties in and on over the Estate are finally found in the following proportions:

Mrs. Widow Dioré 6|15ths;

J. J. Wilson 6|15ths;

Galdemar frères 3|15ths;

The co-proprietors holding their several shares undividedly.

By the same last above mentioned deed, a civil co-partnery was entered into for nine years, by the three co-proprietors; the object was, specially, the working of the said sugar estate.

The Plaintiffs, further, aver that they were, by the deed of co-partnery, entrusted with the management of the affairs of the co-partnery in town. Again, that it was covenanted that in order to meet the expense of working the sugar estate, promissory notes should be made by Wilson and endorsed by the Widow Dioré, which notes should be jointly paid by the co-proprietors of the Estate.

The Plaintiffs further allege that if it were necessary to give a mortgage to secure the payment of such promissory notes or to secure the advances made on account of the sugar estate, the owners bound themselves to grant the said mortgage without delay, so as not to embarrass the working of the said estate.

It was also agreed that the sugars of the estate should be sold at current prices; that each year a statement of the affairs of the partnership should be prepared and the proceeds of the sugar be applied to the expenses of the estate, in the first place, and next to the sale price of the estate.

The Plaintiffs now aver, that in accordance with the above conditions, they, the Plaintiffs, have undertaken the management of the affairs in Town, and have made the advances required for the estate, for the crops 1867-1868 and 1868—69 That on account of such advances made partly with monies belonging to them, the Plaintiffs, partly by means of promissory notes made by Wilson endorsed by Widow Dioré, (although Widow Dioré refused to endorse certain of the said Promissory notes,) the Plaintiffs remain creditors to a large amount. That they the Plaintiffs, have applied to several capitalists and establishments of Credit, in order to raise money to meet the expenses of the "entrecoupe" 1869—1870, but without success. That this has been caused in a great measure by the

ill-will and bad disposition of the Defendants, and chiefly of the Widow Dioré, who, since the last year, has embarrassed the management of the affairs of the said co-partnery, by refusing to give her signature and starting difficulties. That, since the beginning of this year, the Plaintiffs, in order to prevent the laborers, engaged on the Estate, disbanding have been obliged to supply provisions at their own expense; that the Defendants, although duly summoned to contribute in due proportion to their share, have not done so, and have not answered the summons. That a large quantity of canes has been left without guano,—although the Manager has applied for the same. That there is a large sum of money due for arrears of wages to the men who have brought a complaint to the Stipendiary Magistrate of Flacq to have their contracts of service cancelled. That, further more, one of the creditors has commenced legal proceedings in order to be paid a sum of $ 4,150. 86 c. with interest, for an instalment due to him since January last. That such a state of things is intolerable; that the Plaintiffs have offered to contribute cash for their share of the expenses, but their will is rendered nugatory by the refusal of the Defendants to do the same. That, therefore, it is impossible that the Plaintiffs should remain in partnership with parties who, by their ill-will, negligence or wrongful behaviour, refuse to assist them in working the joint Estate.

The above are the several averments made by the Plaintiffs who conclude by praying for a decree for the cancellation of their co-partnery.

The Defendant J. J. Wilson, has pleaded that he has not shown any ill-will or negligence, and that on the contrary, he has always sided with the Plaintiffs in their endeavours to obtain, from Widow Dioré, the execution of her part of the convenant. That such steps and endeavours have failed through the Widow Diore's ill-will, negligence and bad disposition, and on that ground only the Plaintiffs are entitled to obtain Judgment of the Court, cancelling the contract of partnership.

The other Defendant, Widow Dioré, did not plead within the time allowed by law, but on motion made to sign Judgment against her, obtained on 20th April last, leave to file her Plea.

The Plea first pleaded was to the Jurisdiction of the Court and that Plea has already been disposed of, after consideration, by Judgment of this Court, on April 29th 1869. The plea then went on to set forth that the Plaintiffs had no right of action; further that the Widow Dioré denied having refused to endorse bills subscribed by Js. Wilson and necessary to meet the costs and expenses of the Estate *Richfund*, or having ever refused to give a mortgage on the said Estate, in case the same became necessary. That the Defendant has given a sum of $ 300 to buy guano and has, besides, endorsed six promissory notes, amounting together to $14·347 13 ¢. on the 17th November last, which the Plaintiffs have not accounted for and which were meant to defray the expenses of the property and to purchase guano, and since that time, on the 10th February 1869 for instance, she has endorsed promissory notes on account of the said estate, That it was the plaintiffs who, in February last, after consenting to carry on the working of the estate, by means of collateral guarantees, refused to execute their formal execution. That she is still ready to endorse as many bills as may be necessary and is not guilty, whilst the Plaintiffs are guilty, of ill-will, negligence and bad administration.

After the Court had, as aforesaid, dealt with the plea of jurisdiction, and directed the parties to proceed on the merits, witnesses were heard on behalf of the plaintiffs and the widow Dioré, and such evidence together with the documents put in were commented upon by Counsel on both sides, J. J. Wilson preserving the attitude which he had assumed in his plea.

This case, although resting on a special article of the Civil Code, and so far involving a point of law seems to us to depend almost entirely upon the appreciation of a number of facts, and their bearing upon the contract. But there is an objection which was raised in the course of the trial and decided, but of which we are anxious to say a few words, certain witnesses were called, but their evidence was objected to, because they were relatives or clerks of the parties and came under Art. 283, Code Civil Procedure. The question whether the Court could according to the special circumstances attending each case, reject or admit witnesses of that class, or whether they must be absolutely rejected has marshalled, on each side a bead roll of decisions and a powerful array of commentators, We have held and hold that, unless prohibited by the law, we should not shut out the light, but let the objection go to the credit rather than to the admissibility of evidence. In fact, when the law is absolute against the admission of witnesses, its enactment is peremptory: ascendants and descendants in the direct line cannot be heard, and Art. 268 of the Code Civil Procedure is distinct. But when we come to collateral relatives, clerks, servants, or that class of witnesses enumerated in Art. 283 which, besides, is not limitative, the law ceases to be absolute in its terms.

"Pourront être reprochés" says the article. Why this broad difference in the mode of dealing with witnesses of the class alluded to in Art. 268, and the mode of dealing with witnesses of the class dealt with by Art. 283 of both classes must necessarily be excluded. How could sales and deliveries of goods in ordinary commercial cases be proved, what difficulties almost insuperable in every cause of the nature of those in which the rule so well applies, "*d mestica domesticis probantur*?" We sternly decline to let in proof evidence even by indirect way, when we consider that the law is against proof by parol; but in cases where proof by parol is admissible, we are all of opinion that, unless strictly prohibited by the enactment of the law, we should not exclude that light by which we may be guided to justice and truth. There is no doubt that as we have said, cogent reasons may be urged on either side; if it were not so, we should not have such a mass of authorities on one side and on the other; our views which are not new are supported by that eminent writer, Mr. TOUILLIER, IX p. 296 & *Seq.*

—FAVARD, V.—*Enquête*, Sect. I, Par, 4, No. 11, —CARRÉ, 9. 1102, by numerous decisions of Court of Appeal, and by the Cour de Cassation in *Lapoujade v. Amouroux* (S. V. 43. 1. 428). The authorities on the other side are just as respectable, but we must say that our Rules of Court which have greatly modified the system of hearing witnessess who are now almost invariably examined in open Court, whom we see and hear, ourselves, of whose attitude we can judge for ourselves, instead of having to rely simply upon the depositions taken down by a commissioner, have done away with a great many of the objections which the Code of Civil Procedure may have intended to guard against. That Code, no doubt, where not modified by our own legislature or rules, still exists; and upon its provisions, we agree with those who think that the Court may admit or reject such witnesses according as facts believed tend to show that they may be prejudiced or biassed. If all the authorities, save some stray ones, were on one side, in matters of jurisprudence where it is right that the law should be as certain as possible, we should not decide contrary to a constant current of decisions and legal authorities, without most cogent reasons; when the authorities seem so evenly arrayed, we think we cannot do better than seek the truth, although we do so in a way repudiated by some, when it is sanctioned by others of equal weight and equal learning, at least. We may add that in this case, the objection would strike against the witnesses adduced on both sides; if we rejected A. Boullé, we should assuredly reject Olivier and Mercier.

We may also add, that on the merits of the issue before us, we should have come to exactly the same Judgment which we have arrived at, if all the parole evidence were expunged from the record and nothing left but the letters and other documentary evidence which have been adduced.

We shall now pass on to the consideration of the real merits of this cause.

Amongst the circumstances under which a dissolution of partnership takes p ace, the only one which applies to the issues before us is that in which one or more partners seek to obtain, in spite of the refusal of the other partners the dissolution of the contract before the time originally agreed upon for its determination. It is elementary that if all the parties consent to dissolve the partnership, whether the object be the retirement of one partner, or the total cessation of business, the partnership may be fully dissolved, for parties to a contract may when they please sever their connection, and by their joint consent put an end to their agreement.

"D'abord, il va sans dire, (DALLOZ Vo. *Société*) qu'elle peut être dissoute par l'accord de toutes les volontés qui ont concouru à la former; c'est là une règle évidente commune à tous les contrats" But, there may be cases when one of the partners is anxious to put an end to the partnership which the other or one other partner insist upon continuing, and the cause before us is of that nature. It then becomes the duty of those who wish to dissolve the contract, before the time originally stipulated, to show that the grievance which they allege entitle them to the remedy which the law that regulates this special matter has provided by its enactments. Art. 1871, Civil Code, is the one which directly applies to the point at issue. It runs thus: "La dissolution des sociétés à terme ne peut être demandée par l'un des associés, avant le terme convenu, qu'autant qu'il y en a de justes motifs, comme lorsqu'un autre associé manque à ses engagements, ou qu'une infirmité habituelle le rend inhabile aux affaires de la société, ou autres cas semblables dont la légitimité et la gravité sont laissées à l'arbitrage des juges." The article is not only not limitative in its provisions, but expressly enacts that besides the special cases noticed in which one partner may sue for a decree of dissolution, there may be other "cas semblables," the lawfulness or importance of which are left to the award of the Judges. That power left to the Court in terms sufficiently precise to require little additionnal weight from authority, is however fully supported by precedents, inter alia *Benfort* v *Bethfort and Damage*. Court of Aix, 18th June 1822, *Vide*, also TROPLONG II, par. 984.

Those "cas semblables" are very numerous and difficult to specify in a complete enumeration says the last quoted eminent authority. One of the most important, however, after the cause specifically mentioned in the article, the non execution by one of the partners, of his covenant, is that which arises when discord and misunderstanding of sufficient importance to prove prejudicial to the concern has sprung up between the partners. That cause of forced dissolution of the contract may be traced up to the Roman law: "nec tenebitur pro socio, si it à injuriosus et damnosus socius sic, ut non expediat eum pati" writes Ulpian (Dig. pro socio XVII. 14); and is laid down as a strong one by the above mentioned decision of the Court of appeal of Aix, by TROPLONG, by MALEPEYRE and JOURDAIN, p. p. 313, 314; junge DALLOZ, Sect, 666.

In the case before us, several reasons have been strongly insisted upon, to induce us to dissolve this co-partnery; but there are two which require our serious consideration.

The working of a Sugar Estate, in Mauritius is not easily assimilated to the working even of a very large farm in Europe. The capital which must every year be invested to raise and realise a crop, is here comparatively very large, and large on any point of view. It is not sufficient to have the Sugar house and all the plant in perfect working order; a considerable sum is every year, required for agricultural and manufacturing purposes. We have, but too often, had instances before us of the frightful rapidity with which balances accumulate against the imprudent or unfortunate landowner and of the way in which even fair hopes are frustrated, and insolvency follows upon competency. It is therefore important for the proper working of an Estate owned by several co-proprietors any where, it is essential for the proper working of a Sugar Estate here, that harmony should prevail amongst the partners, and that the fabric should be supported by the united endeavours of all, as those endeavours are directed by the covenant and not be brought down by the disintegrating struggles of partners pulling wildly in every direction. These

may be truisms for those who are acquainted with the ups and downs of the Sugar manufacture, but truisms too apt to be lost sight of and the neglect of which is fraught with danger.

Now, in the case before us, we find every element of discord, proof abundant that those partners do not agree, and have not agreed for some time. There is a paper war carried on by means of ushers, no messengers of peace, more and more bitter as it goes on, and the Estate is in the meanwhile, left without the proper supplies, supplies which if not found in time, are almost useless, and if not found at all, leave the partners with the almost certain perspective of a vastly reduced crop. This Estate has received no quantity of guano, at all commensurate with its requirements; that is in evidence; the men have not been paid, or if they have been, since the trial began, and we do not know this as yet, they have been paid in consequence of a measure which shows the almost complete collapse of the undertaking, an order of sequestration following upon proceedings for the sale of the Estate by "Folle Enchère." And why have they not been paid? Why those arrears of wages which have been suffered to accumulate for several months, to the great detriment of the Estate, to the unfair and unjust treatment of the labourer, to the prejudice of hypothec creditors whose claim becomes worse and worse, as the arrears of wages become greater; to the undue dearness of the labour market? the cause, the main cause at least that the evidence points out, is, that those parties cannot agree, quarrel about the means of raising money, about the meaning of their obligations, and lose their credit in the meanwhile What has been the result? Proceedings to sell the Estate by levy are carried on at the instance of the wife of one of the partners, Mrs. J. J. Wilson, a hypothec creditor, nay more, a more summary, root and branch process of ejectment of all the partners, is threatened by a "Folle Enchère" at the request: 1st. of Mrs. Dioré, the Defendant, as guardian of her minor children, then continued, when that D fendant deemed it proper not to carry on a "Folle Enchère," against herself, at the request of Cantin the sub-guardian. We have those facts in evidence; we have the notice previous to levy, under the hand of Mr. Pignéguy, attorney for Mrs Wilson, 24th March 1869; the notice of "Folle Enchère" by Mrs. Widow Dioré, 1st. April 1869; the rule by consent to which Cantin the sub-guardian is as party, and whereby the "Folle Enchère" is stayed, but for a limited period of time, 20th April 1869. We have further legal proceedings threatened by Sauzier, attorney for several parties; his receipts to the Plaintiffs who have, apparently, paid their share of the sums due. What again is the result? The sequestration order has not been filed, or a certified copy of the same, but we take judicial notice of our records; the fact, besides, has not, could hardly be denied, and we have, ourselves issued an order to sequestrate the Estate *Richfund*, a measure resorted to when an Estate is to be sold judicially, and legally placing the Estate, until its sale, or the period fixed in the sequestration Order, out of the hands of the owners. That is the state of things which we find the position of the co-partnery at the present moment. Not only is the Estate threatened with seizure, it is threatened with seizure at the instance of the wife of one of the Defendants; not only is a "Folle Enchère" carried on, it is carried on in the name of the minor children of another of the Defendants herself in the field at the first, then withdrawing to make way for the sub-guardian. And not only are all those proceedings set in motion, but a sequestration Order has been resorted to, "ad rem conservandam," for the partners cannot save the Estate from ruin themselves.

Now, the Plaintiffs appear to us to be right when they say, showing that state of things, that there is here, no disorder with ruin looming in the distance, but disorder with ejectment already begun in all the forms that ejectment can adopt. Here we find discussions and dissentions which, if what we have said of sugar cane cultivation and sugar manufactory be true, show symptoms of the utmost gravity. With all those facts lying before us; we are of opinion that if we have the power to interfere, and we hold that we have such power, we ought to interfere to protect the interest of the parties who complain. It would require strong proof that the Plaintiffs are alone to blame, to induce us to leave them to bear the burden and the consequences of the grievous state of things which is laid before us.

But far from admitting that they are to blame at all, the Plaintiffs distinctly aver that Mad. Dioré's ill-will, the violation by her of the covenant, are the true causes of the actual impossibility to carry on the concern. It is urged by them that the Defendant's object is that the "Folle Enchère" which she began, but from which, it is said, she retreated to give way to the sub-guardian, should run its course, because if the estate is sold by "Folle Enchère," the contract of sale being annulled, Galdemar frères creditors of the Fol Enchérisseur, will lose his lien on the estate.

It is replied that Mad. Dioré co-owner, co-debtor, has rights and liabilities independent of those of her minor children.

All this flank attack seems to us of little importance, it does not help us to solve the second point we have to consider. Is Mad. Dioré to blame? Has she failed to perform the covenant she undertook or have Galdemar "frères," by their fraud or negligence, lost the right to obtain the redress which, upon the facts, they would otherwise, be, in our opinion, clearly entitled to?

Before the Plaintiffs purchased a share of the estate *Richfund*, they had made advances for the working of the estate, securing their balance by hypothec; by the articles of partnership it was specially agreed that the estate should be worked by money raised on notes Wilson endorsed widow Dioré, which notes should be paid by all the co-proprietors; it was also agreed that books should be kept, and that all the parties should have access to them. It appears to us sufficiently clear from the letters that passed from the evidence of A. Boullé and of Dubois, that the Defendant Dioré did refuse to endorse notes for the

working of the estate, and we find no sufficient evidence that the Plaintiffs are to blame. It even appears that when Mad. Dioré failed them, they went beyond the obligations set upon them by the contract, and tried to prop up the declining fortunes of the estate by raising money upon their credit and that of Wilson. It also appears in evidence that instead of the 150 or 200 tons guano which the Estate required, only 35 were sent. Now, although often requested to sign notes to raise money for guano, the Defendant Dioré only advanced $ 300 (three hundred) a sum quite out of proportion with her share of the market price of 150 tons guano. The answer to that was that she did not absolutely refuse to sign notes, but wanted first to know what had become of about $ 14,000 worth of notes she had signed for the working of the Estate. This was stated by Dubois, but it appears to us very plain, that the $ 14,347.13 c. of notes signed by her, were not signed for the working of the Estate, and that Mad. Dioré was well aware of this. There are six notes making altogether $14,347.13 respectively due on 15th September, 30th September, 15th October, 30th October, 15th November, 30th November 1869; now Galdemar "frères" were creditors upon account current for the sum of $ 12,107 deducting from $14,347.13, *i. e.* the total amount of the notes, the discount upon each of the notes at 12 o|o, brokerage and $ 7.25 c. for stamps, we find exactly the balance due to Galdemar, *i. e.* $12,107, the dates of the notes discounted, the figures, tally exactly with the entry in the books, compare the account No. 7 approved by Wilson, dated 31st July 1868, with settlement of 17th November 1868, also approved by Wilson. The argument urged by Widow Dioré in support of her statement that the notes were for the working of the Estate, and not to pay Galdemar his balance of 31st July preceeding, is that the receipt given to her bears the words "pour *Richfund*." But the balance due was for *Richfund*; the notes were to be paid by the three co-proprietors. and there was no impropriety in entitling the receipt "for *Richfund*" But whatever value may attach to that circumstance, we think the weight of the evidence very strongly in favor of Galdemar "frères." Now is it possible to explain otherwise the fact, that to a cent, the amount of the notes is in principal exactly that of the balance. Mad. Dioré had access to the books; they were shown to her, say Brunet; that would be of little consequence, but the account showing the balance, and that is of great consequence, was given to her, she took it, had time to look over it, compare it with the books of the estate, sent her brother-in law to do so, and he did so, she never protested, and it is only when new difficulties arise, when she is strongly solicited to endorse notes in terms of her covenant, that the notion is set up that the $ 14.347 13 of notes were endorsed not to pay the balance due, but to work the estate.

There is no doubt that although Wilson has approved all Galdemar's accounts, the Defendant Dioré, who has not done so, may, unless in some other way estopped, question the correctness of the accounts. But the books of Galdemar "frères," kept in terms of the contract, show at all events, what, right or wrong, they did with the proceeds of the notes, and if they applied the money to a purpose which we think she knew, which she was afforded every opportunity of knowing, we are inclined to believe that Galdemar "frères" were entitled so to do. Surely they were entitled to be paid their balance, how could they get payment, unless some other settlement had been offered, except by the usual course of dealing between the three co-proprietors? Several receipts are produced by Mad. Dioré, none, except a sum of $ 6000, is for notes meant for the working of the Estate. They were made to pay interest to Mrs. Wilson, to herself as legal guardian to pay for a mill and for other causes which have nothing to do with the current expenses of a Sugar Estate. The receipts bear this on their face. There are several other facts not without importance, if we keep in view the covenant. When she compared the accounts, of which she had a copy, with the books of the Estate, if she thought the money raised upon the six notes in question, had been misapplied, how is it that she did not set forth specific objections to the accounts, and help to work the Estate in the meanwhile? We see no distinct charge, no clear objections; why again refuse, when notes became due, and had not to be paid or renewed, to make other notes, unless the Plaintiffs bound themselves personally to pay the notes already made? Why should the Plaintiffs who had the smallest share in the Estate, and were creditors besides, bind themselves personally to pay those notes? Why should they not, as usual be paid out of the proceeds of the Estate, or the private property of the co-proprietors, in fair proportion? The impression left in our minds is this, that the Defendant Dioré does not seem to care to increase the Plaintiffs' balance, provided, come what may, she receives the interest due on her minor's children claim, and that interest is by our law, her property, as their legal guardian. It seems then to us that this course of proceeding is contrary to the express agreement settling the way in which the Estate should be worked.

From the endeavours made by Boullé and Mercier to put an end to the differences that had arisen between the parties, we gather nothing clear but the facts that no plan proposed could find cordial acceptance by all, and that the ways and means to raise money sufficient to work the Estate, could not be obtained either from the ressources of the coproprietors, or the assistance of capitalists and Credit Companies. "The Ceylon Company" found the request made. ridiculous; it is not shown that from any other source there was reasonable expectation, or any expectation at all to find the money required.

The evidence of Mr. Mercier is to the effect that Galdemar "frères" peevishly broke off the last negociations, and packed out of an undertaking they had first promised to assume It is to be regretted that when the Messrs Galdemar were put in the box to give their unsworn personal answers, no question was put to them relative to the interviews to be spoken of by Mr. Mercier. By our law, persons in that position not being sworn, and being put in the box, by their opponent, in order that, if possible, certain admissions or confessions be obtained from them, may not be

cross-examined by their counsel, and are thereby often deprived, through sheer ignorance or want of experience, of giving their own account of what has passed. The admission which is wanted having been obtained, they are dismissed. The result is that a one sided account, or part of a transaction only comes before the Court, and this we think unjust. It is difficult to see, we do not see, why if examined on one side, the party should not be cross-examined. In this case it does not make much difference upon the merits, for if the Plaintiffs gave up the scheme, it appears they had first consented to adopt they were allowed to do so, and the grievance, if any, takes no substantial shape, for we are not told, nor do we see, from what quarter the money required would have come, and who was ready to advance funds upon the securities that might be forth coming. According to the evidence, the parties applied to, had declined and we are carried no farther.

On the whole, then, we are satisfied that the weight of the evidence is in favour of the proposition that Mad. Dioré has broken her covenant, and that the Plaintiffs have fulfilled their's. We are satisfied that the ill-disguised estrangement between Widow Dioré and Wilson, and Widow Dioré and Galdemar, has grown into a spirit of hostility of which we have traced the consequences.

It may, even now, be too late to prevent the ruin of the Estate, but the continuation of this partnership must, in our opinion, prove fatal to the interests of all. In every point of view, therefore, both or one of the special grounds enacted in Art. 1871, and upon an important "cas semblable," of which it is our duty to weight the import, we have come to the conclusion that Judgment must be entered for the Plaintiff, and the partnership between those co-proprietors, on account of the *Richfund* Estate, be dissolved from this day. We are also of opinion that the Widow Dioré must pay the costs of this suit.

BANKRUPTCY COURT.

FAILLITE,—COMPTABILITÉ IMPARFAITE,—CERTIFICAT DE 2ME CLASSE.

Certificat de seconde classe accordé à la Pétitionnaire, sa faillite résultant de nombreuses ventes faites à crédit et d'une comptabilité imparfaite.

BANKRUPTCY,—IRREGULAR MODE OF BOOK-KEEPING,—CERTIFICATE OF THE 2ND CLASS.

The Court being satisfied that the Bankrupt's failure being brought on partly through numerous sales on credit, and partly through an irregular mode of book-keeping, allowed her a certificate of the second class.

BANKRUPTCY ST. GUILLAUME THE WIFE.

Before:

His Honor G. B. COLIN, COMMISSIONER.

P. L. CHASTELLIER,—Of Counsel for Bankrupt.
G. RITTER, —*Attorney for same.*
ROUILLARD, —*Of Counsel for Assignees.*

3rd July 1869.

In this case, the Bankrupt has made the usual motion for a certificate of the first class.

The assignees object. They do not allege any fraudulent act, but rest their opposition on the fact that the books have been badly kept and do not properly disclose the state of affairs of the Bankrupt. It is satisfactory, at all events, to find that no fraud is imputed to the Bankrupt who has been examined as to all her dealings that do not extend over a long period of time. It is, however, much to be regretted that her books should not have been kept in such a manner as to leave no doubt that every thing done by the trader can, after a reasonably patient examination be ascertained from those books.

I cannot too often or too strongly express the opinion of this Court that a regular journal should be kept, even by small traders; the law requires it; common sense would require it if the law did not too often repeat the opinion which I have many a time expressed, that even small traders should keep accounts with one of the Banks; pay into and draw upon the Bank. If they are actuated by the earnest desire of laying clearly before their creditors, in case of misfortune, or surely ascertaining for themelves, in any case, the course of their dealings; the Bank pass, and the Bank Cheque Books are very useful auxiliaries of the Journal; and nothing is more natural than that creditors who lose their money should like to know how that money has gone, and should entertain suspicion and doubt when they cannot find out from the books to whom the money received by the trader has been paid, or in what manner it has been employed.

In this case the observations made by the trade assignee go more to the mode in which such books as the trader kept, have been kept, then to any wilful omission of entries; in fact, the Bankrupt has kept books, from two of which, merchandize bought and merchandize sold, the assignees have been able to trace pretty fairly her real position.

Though she did not, therefore, kept her books as they ought to have been kept, still, there arises no substantial suspicions that she has intended to deceive or mislead her crediters. It appears that, as usual, she has sold a good deal too much on credit, and to too many people. And unfortunately those customers are not few who consider as free gifts, goods sold to them on credit.

Taking into account those debts, and the amount of good handed over to the official assignee, I am of opinion that the Bankrupt has sufficiently explained away the doubts which were naturally created by the irregular unbusiness like mode of book keeping adopted by her, or, more properly, adopted for her by her husband.

Her family was very large, her expenses are not shown to have been extravagant; but I strongly suspect that they must sooner or later, under any circumstances, have proved too much for small returns and bad debts.

I have come to the conclusion that she ought to have a Certificate of the second class.

BANKRUPTCY COURT.

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FAILLITE,—AFFIRMATION DE CRÉANCE,—PRODUCTION TARDIVE,—MOTION A L'EFFET D'OBTENIR LA RÉFORME DU PROJET DE RÉPARTITION DE DIVIDENDE.

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BANKRUPTCY,—AFFIRMATION OF DEBT,—TARDY FILING OF CLAIM,—MOTION FOR LEAVE TO UPSET THE SCHEME OF DIVISION FOR THE DIVIDEND.

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In Re :

Bankruptcy of L. H. & Co.

and

L. H., individually.

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Before :

His Honor Sir C. F. SHAND, Kt., *Commissioner.*

—

2nd August 1869.

When a creditor had sworn to his debts, in the month of April last, but failed to lodge his claim in the Bankruptcy till after all the calculations had been made for the first Dividend, the account audited, and the case was called in Court that the scheme of division prepared by the official Trade Assignees for the Dividend should be approved of:

The Court, in the circumstances, refused to allow the proceedings for the Dividend to be upset and to grant the motion then made by the creditor, for leave te file his claim and share in the Dividend, his share would have been £2 odds, reserving his right to claim under any subsequent dividend.

BAIL COURT.

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COUPS ET BLESSURES,—TRIBUNAL CORRECTIONNEL SAISI DE LA PLAINTE,—AMENDE,—ACTION EN DOMMAGES INTÉRETS,—FRAIS.

Dommages et intérêts nominaux prononcés contre le Défendeur ; ce dernier ayant, pour le même motif, déjà été condamné correctionnellement à l'amende.

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ASSAULT,—CRIMINAL INFORMATION LODGED BEFORE THE DISTRICT COURT,—FINE,—ACTION IN DAMAGES,—COSTS.

Vindictive damages only, awarded against the Defendant, regard being had to his having already been fined before the District Court.

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COTTE,—Plaintiff,

versus

FARIDE, — Defendant.

—

Before :

His Honor SIR C. F. SHAND, Chief Judge.

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W. NEWTON,—Of Counsel for Plaintiff.
E. BERTIN, —Plaintiff's Attorney.
EUG. BAZIRE,—Of Counsel for Defendant.
J. MERCIER,—Attorney for same.

—

13th August 1869.

In this case the Plaintiff asks damages against the Defendant, to the amount of £100, for an alleged assault in the month of June last, by a blow in the eye.

It was shewn in evidence that the Plaintiff who had formerly been a Railway Clerk, came, on the day in question, without any business, to one of the Railway offices in Port Louis, when the Defendant and the other clerks were busy : that an altercation arose between the Plaintiff and Defendant, the latter accusing the former of having spoken calumniously of him, a charge which the Plaintiff denied.

The Defendant advanced towards the Plaintiff, a scuffle ensued, the Defendant endeavouring to put the Plaintiff out of the office, the latter resisting. Just as the scuffle was beginning, the witnesses heard the sound of a blow, but no one saw who gave it ; but upon the whole evidence I am satisfied that the Defendant was the striker, but the blow was not a severe one. The Plaintiff endeavoured to use his umbrella against the person of the Defendant, but the by-standers interfered and separated the parties.

The Plaintiff, immediately, brought a Criminal Complaint against the Defendant before the District Magistrate, who found the charge proved, and ordered the Defendant to pay the heavy fine of £10, with costs.

I am of opinion that in a case of such a nature, the Plaintiff having taken his remedy before the Magistrate, and been successful in getting the Defendant punished, ought to have allowed the matter to rest. But as the door of the Civil Court was open to him, I shall award him 40s. or £2 damages to vindicate the law ; with costs at the rate of the District Courts.

SUPREME COURT.

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VENTE PAR LICITATION, — ANCIEN CAHIER DES CHARGES, — REVENTE PAR FOLLE ENCHÈRE,— MODIFICATIONS DANS DES CLAUSES RELATIVES AUX CONDITIONS DE LA VENTE ORIGINAIRE.

Aucun changement ne peut être fait dans les conditions de vente du premier cahier des charges, lors de la seconde vente d'un Immeuble, par Folle Enchère.

Cependant, si par suite de circonstances majeures, arrivés pendant le temps écoulé entre la première et la seconde vente, des modifications dans les conditions de vente fussent alors jugées nécessaires, notamment l'addition d'une nouvelle clause dans le cahier des charges, ayant pour but de concilier les droits des parties intéressées, ces modifications et addition étant, de plus, les conséquences de l'inéxécution, par l'acquéreur originaire, des obligations par lui souscrites; la Cour autorisera l'insertion, dans les conditions de la dernière vente, de toute clause équitable.

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SALE BY LICITATION,—ORIGINAL MEMORANDUM OF CHARGES,—RESALE BY WAY OF "FOLLE ENCHÈRE,"—MODIFICATIONS OF CLAUSES IN THE ORIGINAL CONDITIONS OF SALE.

No alteration can be made upon the original memorandum of charges, when an Estate is exposed for sale a second time, by way of "Folle Enchère."

Yet, where a material change of circumstances has occurred between the dates of the two sales, suggesting a modification in the articles of sale, and particularly where the emergency requiring an addition to be made to the Memorandum of charges, to do justice to the parties, has arisen from the failure of the first purchaser to perform his obligations, the Courts of Law will authorize proper clauses to be added to the conditions of the later sale.

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WILSON,—Appellant,

versus

CANTIN AND ORS.,—Respondents.

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Before:

His Honor SIR C. F. SHAND, Chief Judge and His Honor G. B. COLIN.

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A. LEGALL, —Of Counsel for Appellant.
J. PIGNÉGUY, —Attorney for same.
E. PELLEREAU, —Of Counsel for L. Cantin.
J. MERCIER, —Attorney for same.
E. BAZIRE, —Of Counsel for C. de Laroche.
A. ASTRUC, —Attorney for same.
L. ROUILLARD, —Of Counsel for J. Dioré.
V. BOULLÉ, —Attorney for same
P. L. CHASTELLIER,—Of Counsel for Galdemar frères.
F. VICTOR, —Attorney for same.
J. Wilson the wife, leaving default.

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17*th August* 1869.

The Estate *Richfund* formerly *Mount Alba*, in the District of Flacq, containing about 1,200 acres, or thereby, was sold on the 5th of May 1863, by Licitation between the heirs and representatives of the owner, then deceased, the late Mr Pierre Dioré, for the price of £135,000. The purchaser, the Appellant in this case, Mr Julius Joseph Wilson, landowner, is the husband of one of the daughters and heirs of the late Pierre Dioré, by a first marriage. The other parties interested in the sale were; the widow of the late Pierre Dioré and her minor daughters by her marriage with him, of whom she was the legal guardian; their sub-guardian Mr *Lisis* Cantin; Joseph Dioré, of Port Louis, and *Auguste* Dioré of the same place, as legal guardian and sub-guardian of Jean Pierre Dioré, the natural acknowledged son of the said Pierre Dioré. The conditions of the sale, as to payment of the price, were as follows: a deposit, at the very time of the adjudication, of one fourth of the sale price, if required by any of the parties, and the payment of the balance by eight equal instalments from year to year; the first to be paid one year from the date of the adjudication, with interest at 9 per cent; and in case no deposit should be required (and in fact none was required) then the whole of the sale price was to be payable by 8 equal yearly instalments, together with the interest at the rate of 9 per cent, payable every six months to the guardian of the minors Dioré and to the parties of age.

On the 6th July, thereafter, viz; 1863, the purchaser, Mr Julius Joseph Wilson, sold to the widow Dioré ten fifteenths of the property, by Notarial deed passed before Mr Pelte, Notary, remaining, himself, owner of the other five fifteenths. On 28th October 1867, Mrs Dioré resold to the said Julius Joseph Wilson, one fifteenth of the property, and to Messrs Galdemar Frères, Merchants in Port Louis, three fifteenths, the ownership of the said Estate thus, ultimately, standing: six fifteenths in the person of Mrs Dioré; six fifteenths in that of the said J. J. Wilson, and three fifteenths in Galdemar Frères. In the said deed of sale, Mrs Dioré, as tutrix of her two minors daughters, agreed to prorogate the term of payment of the share of the price due to them in this manner, that is to say, it was agreed that the amount due to them should be paid in seven instalments by equal yearly sums beginning on the 1st January 1869 and going on to and including the year 1875; the first term being thus payable on the 1st January 1869, and the last on the 1st January 1875; interest at the rate of 9 per cent was to be paid every three months, counting from 1st January 1867, and the said interest were to be provided for out of the general funds of the Estate, by a Partnership for working the property constituted by the same deed among the said 8

parties, in the proportions above mentioned. By the same deed, Mr. Wilson undertook that his wife should accord to the said parties, the proprietors of the Estate, a similar prorogation of the term of payment of her claim, and upon the same conditions as that granted by Mrs Dioré to herself and the other two co-associates for the amount due to her minor daughters.

It was expressly stipulated that the enlargement of the time for paying the price, was granted without any innovation or derogation from the rights, actions or privileges of the minors Dioré over the estate *Richfund*.

The management of the Property under the said Partnership, was not prosperous. The partners did not agree among themselves, and the Estate was put under Judicial Sequestration. Mrs Wilson proceeded to sue out an "expropriation forcée," whereupon Mrs Dioré, acting as guardian of her minor children, entered proceedings before the Master, for the resale of the Estate, by way of "Folle Enchère." To avoid the opposition of interests which might arise between the minors and their mother as their legal guardian, Mr Lisis Cantin, the sub-guardian, was authorized, by the deliberation of a Family Council, to follow out the proceedings of "Folle Enchère" begun by Mrs Dioré, and the sale was fixed to take place before the Master of this Court, on the 6th May last.

At this stage, Mr Cantin obtained from the Master, an Order calling before him the other persons interested, to shew cause why the clause in the conditions of sale to J. J. Wilson, in 1863, regulating the payment of the price, and above referred to, should not be amended and the following clause substituted in its place, viz:

"Inasmuch as security from the risk of an "Insolvent purchaser is not the only object "aimed at, the purchaser of the said property, "whether he bids in person or by an agent or "through an Attorney at-law, acting, when so "bidding, in the legitimate exercise of his func-"tions as such Attorney, shall be bound to de-"posit, cash, into the hands of the Master of the "Supreme Court, at the very time of the adju-"dication of the said property and before the "same is knocked down to him, one fourth of "the sale price, if required to do so by any one "of the parties interested, and the three-fourths "shall be paid by two equal instalments from "year to year; the first instalment becoming due "one year after the day of the adjudication of the "said Estate, together with interest thereon, at "the rate of nine per centum per annum, paya-"ble quarterly to the guardian of the minors "Dioré and to the other parties of age, and in "case no deposit should be required, then the "whole of the sale-price shall be payable "by two equal instalments, the first of which "becoming due one year after the adjudication, "and the second one in two years from the day "of the adjudication, together with the interest "thereon at the rate of nine per centum per an-"num, payable, every three months, to the "guardians of the minors Dioré and to the par-"ties of age."

The purchaser J. J. Wilson opposed the proposed change, contending that no alteration can be made upon the original memorandum of charges, when an Estate is exposed for sale a second time, by way of "folle enchère." The Master, in his Judgment of date 28th April 1869, overruled the objection, and ordered that the clause should be modified as prayed for, excepting that the interest should remain payable every six months.

J. J. Wilson appealed to the Supreme Court.

A. LEGALL, for Appellant, stated the sale to his client, of the Estate, in 1863, the subsequent sales of portions of it, leaving it standing 6|15 in his person; 6|15 in that of Mrs Dioré, and 3|15 in Messrs Galdemar Frères. By the deed of 1867, Mrs Dioré, as tutrix of her minor daughters, agreed to enlarge the period of payment of the price, so that it should be paid by 7 yearly instalments beginning: the first, on 1st January 1869; the interest was to be paid quarterly, beginning from 1st January 1867.

This was an implicit acknowledgment that no interest was due or owing, prior to that last date. The Partnership between Mrs Dioré his client, J. J. Wilson and Messrs Galdemar constituted, by said deed, did not succeed, and Mrs Dioré has entered the present proceedings for the resale of the Estate by "Folle Enchère;" We cannot resist the proceedings which are now carried on in the name of Lisis Cantin, the sub-guardian who chooses to lend himself to her views, but she will, herself reap the whole advantage, as the income of her minor daughters will be paid to herself; but we do resist the extraordinary proposition that under the new sale, the price shall be payable in a way totally different from what it was under the terms of the former sale. Instead of 7 yearly instalments, it is asked to have only two, and the interest instead of being payable every six months is to be paid every three months. The Master has admitted the change as to the instalments. Thus the position of my client as the "Fol enchérisseur" is rendered much worse; a less price will be got for the Estate and he will be liable to pay the difference. But this Court has twice decided that under a sale by "Folle Enchère" the position of the original purchaser cannot be made worse. *Lamarre*, (PISTON'S *Reports*, Vol. 5, p.21) *Delafond*. (*Ibid*: p. 107.) The Master holds that if the change in the conditions of sale is caused by the fault of the first purchaser, the change ought to be made; but it is obvious that this reasoning is unsound, as every "Folle Enchère" is caused by the failure of the purchaser to fulfil the conditions which he has undertaken. But the Master has mistaken the position of matters. He assumes in his Judgment that several instalments are due, but there is only one, viz: that payable on 1st January last; and all the interest, as we have seen, was paid up to the 1st January 1867. The French cases referred to by the Master are not applicable. The change proposed to be introduced in the present case is of far greater moment than the alterations there allowed. They differ both in kind and extent.

Mr CHASTELLIER for Galdemar frères :

Although on the Record I am Respondent, I follow Mr LEGALL on the same side : (Counsel narrated the facts.) We have a great interest to watch those proceedings, as our rights will be swept away by " Folle Enchère. " Mrs Dioré, now change her position, and tho' she still remains debtor in the price which she engaged to pay, she will enjoy the revenue of her minor children as their guardian. She has contrived to get, through Mr Cantin, the Sub-guardian, the authority of a Family Council to give a preference over the Estate to any money-lender who will advance funds to an approved purchaser sufficient to cover the amount of deposit and the expense of making the next crop, provided the proposing purchaser do make a bidding of £135,000 at least, for the Estate. This shews the animus of Mrs, Dioré and such an arrangement will be highly prejudicial to the children.

The original " Cahier des charges " cannot be changed, but must be the basis of the resale of " Folle Enchère " Art: 735. C. CIV. PROC : 25th June 1813, S. 14.2.302. In our own Supreme Court, this has been already twice decided: *Lamarre* (PISTON'S *Report* 1865. vol. 5 p. 21) *Delafond* (*Ibid* : p. 107.) The enactment that the new sale shall take place " sous l'ancien cahier des charges " was not in the french law originally ; but this was, all along, the basis of the proceedings in " Folle Enchère." CARRÉ and ADOLPHE CHAUVEAU p. 312. The *arrêt* in S. 12th July 1813, p. 340, is directly in point.

The french cases cited by the Master, do not apply. In this case of *Mounier*, v. *Boujou* S. 54.1.777, there was merely a question of payment of some interest. The Master erroneously supposed that payment of 6 instalments were asked ; but this was not the case, as only one was due and could be asked under the prorogation granted for payment of the price.

E. PELLEREAU for Mr Cantin, Sub-guardian : Strong allegations have been advanced against the *bona fides* of my client ; but no collusion was alleged before the Master, and none exists. The sale must be public after due advertizements, as the interests of minors are here involved. The real and full price will be secured, and the minors will be duly protected. It would be easy to retort upon the Appellant, for he was only a " prête nom," and this proceeding by way of " Folle Enchère " is the only mode open for the protection of the interest of the family and the creditors of the former owner, Mr Dioré. A family Council has been duly convoked under the presidency of the Master of this Court, and we trust the Court will have no difficulty in homologating its resolutions to the effect of authorizing the guardians of the minors giving a preference to any person who will come forward and advance funds to an eligible purchaser to ensure a good price for the Estate. All the proceedings have been perfectly regular. I refer in *Chapman* case, 5th August 1862, (PISTON'S *Reports*, 1st Edition, Vol. II, p. 81,) confirmed by the Privy Council.

The great argument against us, here, is that the Master has illegally changed the " Cahier des Charges ;" but this is a mistake. He has not altered its real meaning and sense. The purchaser had 8 years, from 1863, to pay the price. The Order, by the Master, that the price should be paid by two yearly instalments is, really favourable to the " Folle Enchérisseur," as the six instalments are already due and might have been, at once, demanded. (TROPLONG, *Priv. et Hyp.* 2.154 Vol. 3 p. 192.) How is the Appellant Wilson injured ? He is really owing more than is asked of the new purchaser. He may be liable to pay any difference between the old and new price ; but *contrainte par corps* for the deficiency is now abolished. If the Appellant's contention were given effect to, resales would go on for ever ; the price would never be paid, and what is to come of the creditors on the Estate, such as Olivari and others, throwing for the moment, the interest of the owners out of view. The Appellant has not paid any thing. So he is out of Court. All the parties to the former " Cahier des charges " did not give delay, only some of them, and what they did cannot *bind* the others ; Wilson is the only Appellant ; we must, therefore, presume that Galdemar Frères are satisfied. I refer to DALLOZ, *Vente publique des Immeubles*, No. 1907 and seq : CARRÉ CHAUVEAU, Vol. 5.2.740, 1,268, 2,242—S. 1815.2.61.

JUDGMENT.

The leading question in the present case, viz : how is the memorandum of charges of the sale of this Estate *Richfund* to be framed under the proceedings which have been taken by way of "Folle Enchère," is one not only of interest to the parties, but to the law itself, for it has been anxiously argued, and we think it may be fairly said that a point of principle is, to some extent, at least, involved.

Unquestionably, the general rule is quite firmly established, that, in sales by " Folle Enchères," the clauses and conditions of the re-exposure of the immoveable subject shall be the same as those under which the purchase was made by the " Fol Enchérisseur," unless he consents to the change ; and this, for the obvious reason that as he is responsible for the difference of price, if a less amount is realised at the second sale, altho', by the late change of the law, no longer by *contrainte par corps* ; his case under the resale should not be made worse, and his position more onerous than it otherwise might be if the re-exposure were to take place under new clauses and conditions to which he had not consented and to which he would be a stranger. Such is the general rule in France, as was pointed out by the Counsel for the Appellant and Messrs Galdemar frères, in the course of the argument, and the same principle was given effect to in the two cases of *Lamarre & Lafond*, decided by this Court, which have also been quoted in the discussion. It may be remarked that the later French law contains an express enactment that the new sale by " Folle-Enchère " shall take place *sous l'ancien cahier des charges ;* CODE PROC. CIV., Art. 735. This article is, of course, not law in Mauritius, but it is truly only an exponent of the general principle which has obtained, all along, in

this branch of the law of transference by Sale of Immoveable subjects.

Such being the undoubted general law, the Appellant maintains the proposition that the principle is in itself so equitable and so necessary to meet the justice of the position of the first purchaser, as against whom the new sale is to take place, that the rule is inflexible and cannot be modified or, at all events, that the changes in the articles of sale which the vendors, here, wish to introduce under the "Folle-Enchère" are so great and so prejudicial to the interests of the Appellant, that they cannot be admitted consistently with a due and sound interpretation of the law. It is now necessary that we should examine the value of this position which is the basis of the present appeal against the Judgment of the Master.

Although, as we have seen, already, the rule above stated is undoubtedly the general one, it need scarcely be said that in its application to the complicated and ever varied circumstances which occur in individual cases, Courts of Law have been obliged to admit modifications more or less important that true and substantial justice might be done to the parties. Nor will this be deemed remarkable when it is remembered that in some cases when the payment of the original price is postponed to a distant date, a considerable period of time must elapse between the two sales, bringing with it, in many instances, a variety of changes in the relations of the parties interested among themselves, or with respect to the immoveable subject which is again to be brought to public sale. Thus, in the case of *Villeneuve* v *Dupuis*, 28th December 1852. S. V. 1853, Part 1. p. 408, the Court admitted the insertion of a clause into the new "Cahier des charges," which did not occur in the memorandum of conditions of the first sale. The clause was to the effect that the new purchaser should, within one month of the sale, pay the price to the privileged and hypothecary creditors, according to the final "Ordre" which had previously been drawn up and established among them. The Court of last resort (Cassation) in admitting the new clause, enunciated the following among other grounds of Judgment: "Que l'addition inséré au cahier des charges, n'étant que la reproduction des clauses précédentes avec leurs conséquences légales, telles qu'elles résultaient des faits survenus postérieurement;" — so, again, in the case of *Mounier* v. *Bouju*, 17th August 1853, S. V. 1854, Part 1 page 778, the same Court decided that: "Bien que l'adjudication après folle enchère, doive être prononcée sur le cahier des charges de la première adjudication; cependant on peut insérer dans ce cahier des charges, des clauses qui seraient la conséquence de l'inexécution des obligations imposées au premier adjudicataire: Telle est la clause qui mettrait les intérêts du prix de la première adjudication à la charge du second adjudicataire, sauf recours contre le premier, &c."

In a late case in our own Court, viz: that of *Mallet* v. *Harel & others*, 19th February 1869 (PISTON's *Reports*, Vol. 9. p. 4) we had a stricking example of a very important addition being made to the original memorandum of conditions, when the Estate came to be re-exposed for sale upon a "Folle Enchère." The Estate *Fontenelle* had been sold, upon a licitation, to Léonard Castillon, who, without paying his sale-price, had resold it to Arthur Harel. At the time of the sale, the latter made a large deposit towards payment of the sale-price, and a portion of this deposit had been paid to a Judicial Sequestrator who had furnished supplies for carrying on the property. When the "Folle Enchère" took place, the Court, to meet the sum which fell to be repaid to Harel, authorized a clause to be added to the original conditions, whereby the purchaser was obliged to deposit, at the time of the adjudication, £14,831.57 c. the difference between the whole sum deposited by Harel and the portion of it which remained in the Master's hands, after paying off the claim of the Sequestrator. This was an important innovation upon the original conditions of sale, but one which the Court authorized for the purpose of meeting the peculiar circumstances which had emerged betwixt the two exposures.

We thus find that the principle has been given effect to both in France and in our own Colony, that where a material change of circumstances has occurred between the dates of the two sales, suggesting a modification in the articles of sale, and particularly where the emergency requiring an addition to be made to the memorandum of charges, to do justice to the parties, has arisen from the failure of the first purchaser to perform his obligations, the Courts of Law will authorize the proper clauses to be added to the conditions of the later sale.

But, while we are satisfied that the Court has power to make changes in the articles of sale, a power which, in any view, it will necessarily be very cautious and careful in exercising; when we come to look at the clause which it is proposed, in the present case, to substitute for the one that stood in the original conditions of sale, it is by no means so clear, as was assumed by the Counsel for the Appellant, in the argument, that the proposed clause in regard to the payment of the price, is, really and in truth, a change or innovation. In the letter of the articles of sale, it may be so; but after all does it do any thing more than fairly carry out the original condition as to payment of the price according to its real meaning and spirit, bearing always in mind the considerable lapse of time which has taken place, and that no part of the price, whatsoever, has been paid by the Appellant Mr. Wilson? The original stipulation as to the payment of the price was, that the amount should spread over 8 years; the whole sum being payable by 8 equal instalments, beginning, the first, one year from the date of the adjudication, *i. e.* 5th May 1868. We are, now, in the year 1869. So, at 5th may last, 6 instalments were due; for nothing has been paid by Mr. Wilson, and he can take no benefit by what has been called the sub-agreement prorogating the term for payment of the price, dated 28th october 1867, above refered to; for, he has not paid one shilling under it, and the original condition by such failure, and by the very terms of the deed, itself, immediately revives and comes again into full operation. Now does the clause as to payment of the price, pro-

posed to be substituted for the former one, lay any fresh burden upon the shoulders of the Appellant beyond what he is already under, or make his condition worse than it is at the present moment? It will be observed that the terms proposed by Mr. Cantin, and sanctioned by the Master, are more liberal than the original ones; for, it is proposed to accord to the purchaser, one year after the date of the adjudication, to pay the first instalment of one half of the sale-price, and another year thereafter, for payment of the second instalment; the interest being payable every six months. Is this a change of which the Appellant, the "Fol Enchèrisseur" can complain? Do not those new, conditions carry out, substantially and in a *bonâ fide* way, the true intent and meaning of the original articles, keeping in mind the lapse of time which has taken place since the date of the sale in 1863? The contention of the Appellant is that the conditions of sale must, just simply, be repeated, changing the date from 1863 to 1869; in other words, that the sellers who stipulated for payment of the whole price in 8 years, shall grant a second and fresh term of 8 years. It appears to us that this is quite unreasonable, and would be a sacrifice of the spirit and meaning of the original memorandum of charges to the mere letter of the conditions of sale. Putting the matter in another light, the success of the Appellant's argument would lead to a very startling result. Suppose in like manner, as has already actually occurred, the new purchaser should fail to pay his sale-price, and another "folle enchère" should supervene, it would necessarily follow, if the Appellant's argument were to succeed, that a fresh term of 8 years for payment of the price must be accorded, and the date of payment of the price of the Estate be, thus, indefinitely postponed.

We are, therefore, of opinion that the Master has taken a sound view of the law in reference to the new clause proposed as to payment of the sale-price; and his Judgment is, hereby, affirmed with costs.

SUPREME COURT.

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VENTE D'IMMEUBLE,—ACTION EN RÉSOLUTION,—FRAUDE,—FOLLE ENCHÈRE,—TRANSCRIPTION,—PRIVILÈGE.

Le droit de Folle Enchère ne se perd pas comme le droit de résolution de vente, par défaut de transcription dans un certain delai.

Le porteur des états de frais encourus pour faire vendre un immeuble devant le Master de la Cour Suprême, ne peut, en conséquence, demander la résolution de la revente du même immeuble par l'adjudicataire à un tiers, sur le motif que cette revente a été faite frauduleusement et pour éluder, après les délais de transcription, le paiement des états de frais de la vente. Le porteur de ces états de frais peut toujours exercer son droit de Folle Enchère.

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SALE OF IMMOVEABLE PROPERTY,—ACTION IN CANCELLATION THEREOF, — FRAUD, — FOLLE ENCHÈRE,—TRANSCRIPTION,—PRIVILEGE.

The right of Folle Enchère is not, like ordinary vendor's right, lost if not transcribed within certain delay.

The bearer of bills of costs incurred in order to arrive at the sale of an Immoveable property before the Master of the Supreme Court, cannot, consequently, claim the cancellation of the resale of the said property by the adjudicatee to a third party, on the ground that such resale has been made fraudulently and in order to avoid payment of the said costs of sale after the delays of transcription.

The bearer of such bills of costs is always entitled to exercise the right of Folle Enchère.

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RAYNAUD,—Plaintiff,

versus

DU RHONE,—Defendant.

—

Before:

His Honor JUSTICE BESTEL and
His Honor JUSTICE COLIN.

—

L. ROUILLARD,—Of Counsel for Plaintiff.
E. DUCRAY, —Plaintiff's Attorney.
E. PELLEREAU,—Of Counsel for Defendants.
A. ROHAN, —Defendant's Attorney.

—

2nd July 1869.

This was an action brought for the annullation of a sale made by the Defendant to one Widow Ebrard, of a house situate in Créoles street, in this City of Port Louis, upon the ground that the said sale was fictitious and fraudulent.

The Court has had on two occasions, to deal with questions that arose incidentally in the course of the trial of this cause, and it will only be necessary now, to lay a brief summary of the facts on which the action was made to rest.

It appears that on the 26th July 1866, the Defendant purchased at the Bar of the Master's Court, a house situate in Créoles street, Port Louis, upon the sale by Licitation of the same. Certain costs were due on account of such sale, by the Defendant, to the Attornies who had acted in the matter, and it would also appear that the Defendant Du Rhone, at or about the end of January 1867, asked the Plaintiff to pay such costs for him, which the Plaintiff consented to do, obtaining from the Attornies a proper subrogation in their respective rights. It would further appear that on 12th August 1867, the said F. Du Rhone sold the house in question to the said widow Ebrard, and the Plaintiff alleges that such sale was made by the Defendant Du Rhone to defrau

his creditors, and especially to defraud the Plaintiff of his privilege over the said property.

The Widow Ebrard suffered default to be recorded against her. F. Du Rhone's plea traversed all the facts set forth in the Declaration, specially denying that the sale by him effected was made to defraud his creditors, or that he had promised to give the Defendant a privileged claim over the said property.

JUDGMENT.

The first essential condition under which a suitor is allowed to pray for the annullation of a covenant to which he is not a party, is that he should be aggrieved by the same. That his existing rights should be taken away or lessened by the contract of which he challenges the lawful force. In a word that he should have a legal interest.

The Defendant Du Rhone is, here, alleged, by the Plaintiff, to have fraudulently sold his house to another person; the Plaintiff is bound to show that the sale is prejudicial to him, has lessened his security, has deprived him of that which he was entitled to, before he can show that the contract is one which ought to be annulled by the Court, as a fraudulent contract.

The Plaintiff, it seems to us, has no interest that has been at all interfered with. How can the sale by Du Rhone to Ebrard interfere with the payment of the costs due by Du Rhone, on account of his own purchase at the Bar?

Why should he not sell? by what new and binding stipulations has he deprived the Attornies bearers of the bills of costs on the Plaintiff, or their assignee, of their right to sue? In what manner can a sale, or fifty sales, change the original conditions of sale which, if binding upon Du Rhone, are binding upon the purchaser from Du Rhone, in exactly the same way. Du Rhone is liable to a "Folle Enchère" if he does not pay the costs of sale, the purchaser from Du Rhone takes away the Estate with all its encumbrances, charges and equities, unless the same have been cleared, or unless the owners of the claims upon the Estate have, by their own act, lost any privilege attached to such claims. What could the Attornies do as against Du Rhone that the Plaintiff, their assignee, cannot now, on account of the sale from Du Rhone to Ebrard, do as against Du Rhone and Ebrard? The Attornies had a right of "Folle Enchère;" has the sale in question done away with that right of "Folle Enchère?"

Nothing has been laid before us to show that there is the slightest proof of this. It was suggested by the Plaintiff that he had not transcribed his right of "Folle Enchère." Rights of "Folle Enchère" are not, like ordinary vendors' rights, lost if not transcribed within a certain delay; (vide *Vallet* v. *Hewetson*) if they were, the Plaintiff would have lost a privilege attached to his claim by his own fault, not by the fact of the sale by Du Rhone to Ebrard.

It would be contrary to every principle of real property law to suppose that, *cæteris paribus*, the purchaser of an Estate could, by simply selling such Estate to a third party, sweep away the conditions under which he bought.

Now the Attorney's right for costs of sale unpaid, is a right of "Folle enchère"; it is a right which arises, not like the hypothec, or a personal claim before the sale, but a right which arises after the sale, and on account of the sale; and on that very account, carries its own special privilege. The Attorney's costs of sale are not paid out of the purchase price, they are paid over and above the purchase price. It is not, that we are aware, the practice for Attornies to inscribe their right arising out of their bills of costs, upon a Judicial sale; but if they do so, inscribe them *ad majorem cautilam*; their remedy is, surely, at all events, the "Folle enchère" in case of non payment.

Let us suppose, for the sake of the argument, that the Attorney may expropriate; how does the sale from A. to B. prevent him from expropriating, how can it do so unless he has chosen to lose that right by his own laches and negligence? The sale, *per se*, surely cannot prevent him.

Let us carry the argument further, and suppose that the right of "Folle enchère" being lost, the Plaintiff has nothing left but a personal claim against Du Rhone. In such a case, if Du Rhone has, for no consideration or a fraudulent consideration, conveyed his house away so as to shield it from his creditors, the cause would stand in a different light.

But we find in this case that Du Rhone bought for the sum of $4,000 under certain conditions as to payment; a few months afterwards he sells to Ebrard for the same sum, and charges the purchaser to pay under the same conditions, *i e* after deed of partition has been drawn up and in the way that the Court shall direct her to pay. In fact Durhone, personally, does not appear to have any claim to any portion of the original sale price which must first go to the vendor's creditors, secured on the property, and then to the co-proprietors themselves, if there is a balance.

In the conditions of the second sale then, there is nothing new, there is no money paid to Durhone or assigned by Durhone, if any portion of the $4000 was to go to Durhone before the same portion would go to Durhone now; and if claiming under him, his creditors could secure that sum then, they can secure it now. There is no allegation that house property has increased in value, and that the sale of this house for the same amount for which it was bought a few months after it was bought, is suspicious, as the sale of any kind of property much below its real value, might be, in some instances, suspicious.

To resume, then, if the costs of the Judicial sale have not been paid, Du Rhone is liable to a "Folle Enchère;" the purchaser under him is liable to a "Folle Enchère," in the same manner.

We fail, then, to perceive in what way the sale has deprived the Plaintiff of any privilege.

If Du Rhone has, under the deed of partition, any sum to receive out of the original sale price, his creditors can, now as before, reach that sum of money; the sale to Ebrard has not divested Du Rhone, in this particular case, of any claim he may have had; has not, therefore, deprived his creditors of any claim they may set up under him.

There is no personal right taken away from the Plaintiff, by the sale.

For those reasons, we think the Plaintiff is out of Court, and that it is not necessary to inquire on the merits whether the sale was fraudulent or not; indeed, unless it was made to defraud the Plaintiff, it is difficult to see what creditors it was meant to defraud, since no portion of the price is paid by Ebrard to Du Rhone, and not a condition is changed.

There was an allegation, however, to which we paid a good deal of attention, and on which the evidence laid before us might have thrown much light and have quite altered the position of things. It is the allegation that the Defendant Du Rhone held out to the Plaintiff the hope that he should have a privilege over the Estate.

What better privilege the Plaintiff could receive than the one he had? we cannot say, but the evidence fails to show that any such promise was made, and the case resumes its original position, that the sale has not, *per se*, invalidated the rights held by the Plaintiff, that whatever they may be, those rights are now what they were before the sale, untouched and unchanged, and that, accordingly, the Plaintiff has no interest to challenge the same on account of such sale.

The action must be dismissed with costs.

SUPREME COURT.

SUCCESSIONS, — MINEURS,— PARTAGE,— HOMOLOGATION,—CO-PARTAGEANTS,— PRIVILÈGE.

Le co-partageant, même mineur, qui n'a point inscrit son privilége dans les délais de la loi, perd tout droit de suite et tout privilége sur les immeubles qui n'ont point été affectés à son lot.

Le délai accordé par la loi au co-partageant pour inscrire son privilége, court du jour de la vente des immeubles de la succession, lorsqu'ils ont été aliénés, et non du jour du partage.

Spécialement, si le co-partageant mineur a été colloqué sur un des immeubles ayant formé partie de la communauté, et achetés depuis par le mari, et que cet immeuble se vende à la mort du mari un prix insuffisant pour couvrir le lot du mineur, celui-ci, s'il n'a point inscrit son privilége dans les délais prescrits par la loi, ne pourra, au détriment des droits acquis par des tiers, se faire colloquer sur les autres immeubles ayant formé partie de la communauté.

SUCCESSIONS, —MINORS,— PARTITION,— HOMOLOGATION,—"CO-PARTAGEANTS,"—PRIVILEGE.

The "co-partageant," even where he is a minor, loses his privilege and his "droit de suite" *on the other immoveable properties of the succession if he has not inscribed his privilege within the delays prescribed by law.*

Such delay runs from the day of the sale of the immoveable properties (when they have been sold by the heirs) and not from the day of the deed of partition.

Therefore, when a minor "co-partageant" had been collocated, for his share, on the price of one of the immoveable properties which had formed part of a "communauté" *and had been purchased afterwards by the husband, and when after the death of the latter, the immoveable property was sold for a price which was not sufficient to pay the share of the minor, the latter, having failed to inscribe, in due time, his privilege on the other properties of the* "communauté," *such minor had no privilege or* "droit de suite" *on such properties.*

BOURRELLY AND WIFE,—Plaintiffs,

versus

ASSIGNEES BAZIRE & ORS.—Defendants.

In the cause

THE ORIENTAL BANK CORPORATION,

THE CHARTERED MERCANTILE BANK,

and

THE ASSIGNEES OF E. LEPOIGNEUR,—

Intervening Parties.

Before:

His Honor C. F. SHAND, Kt., Chief Judge, and His Honor G. B. COLIN.

HON. V. NAZ, —Of Counsel for Plaintiffs.
J. G. TESSIER, —Plaintiffs' Attorney.
HON. H. KŒNIG,—Of Counsel for Intervening Parties.
E. DUVIVIER, J. PIGNÉGUY, H. BERTIN, } Attorney for same.
E. PELLEREAU, —Of Counsel for minor Lepoigneur.
J. MERCIER, —Attorney for same.

17*th August* 1869.

This was an application made by the Plaintiffs exercising the rights of their debtors, under Art. 1166 Cod. Civ., to obtain from the Court a Judgment homologating and affirming a deed of rectification of the partition and liquidation of the Estate and community which had existed between the late Victor Lanougarède and his predeceased wife. The original deed of partition had been drawn up by Pelte, notary public, on the 26th October 1865 and duly homologated and affirmed by the Court, on the 20th February 1866. To the application now before the Court, the minors Lepoigneur, the assignees of Widow Bazire, of

Widow Vaudagne and of P. Ivanoff Lepoigneur, were made Defendants as representatives of the late Lanougarède and his wife.

The Oriental Bank Corporation, The Chartered Mercantile Bank of India, intervened in the cause, and supported the application made by the Plaintiffs. The assignee of Elp. Lepoigneur also intervened, and of the actual Defendants, the assignees of Widow Bazire, of Widow Vaudagne and of Ivanoff Lepoigneur, who had respectively been before the Court of Insolvency, also supported the application, whilst the minors Lepoigneur, by their guardian, objected to the same, and contended that the deed should be remitted to the Notary to rectify the same in accordance with the views of the minor Lepoigneur, which shall be presently set forth.

In the course of the proceedings, several suggestions were made, one of which alone requires a special notice. Isabella Lepoigneur, one of the heirs Lepoigneur, died, leaving her minor brother, Charles Victor Lepoigneur, her universal legatee.

For the elucidation of the facts of this cause, it is necessary to go back to the death of Mrs. Lanougarède. That lady died on the 2nd June 1864. The Estate held jointly by her husband, and herself, was then ordered to be sold; twenty three houses or Sugar Estates were put up for sale; twenty three "Cahiers des Charges," each embodying the conditions of sale of the property to which it applied, were framed, and Lanougarède purchased the twenty three houses or Sugar Estates. A deed of partition was then drawn up by Pelte, settling the share accruing to Lanougarède, himself, in the joint-Estate; settling also the shares of his three children or their representatives as heirs of the late Mad. Lanougarède, and further determining the attributions to be made to each; determining, for instance, that the share of Lanougarède should be paid out of the purchase price of certain specific Estates, that the shares of the heirs Lepoigneur should be paid out of the purchase price of certain other specific Estates.

That mode of settlement of the respective claims of the "co-partageants" or co-proprietors was accepted by all the parties whose interest it dealt with, and was, finally, upon the conclusions of the Ministère Public, affirmed and homologated by a Judgment of the Court.

Lanougarède had then died, and all his children accepted his succession, save the minors Lepoigneur, who, by right of their minority remained heirs under benefit of inventory.

They now take their stand as representatives of Made. Lanougarède, and as such, creditors of Mr Lanougarède, and discard all liabilities arising out of Mr. Lanougarède's own succession which they repudiate.

The other heirs Lanougarède became insolvent, petitioned the Court of Insolvency, were admitted to make a "Cessio Bonorum," and as we have seen, are now represented by their assignees. Now, when they became insolvent, all the Estates bought by Lanougarède, and which, at Lanougarède's death, had come down to them, were once more sold; some by "Folle Enchère" at the request of creditors of both Mr. and Mrs. Lanougarède; others by "Folle Enchère" at the request of the heirs Lepoigneur, themselves; others, again, were judicially sold at the instance of the assignees Lanougarède.

Of the first class of Estates, there is and could be no difficulty; the unpaid vendors of Mr. and Mrs. Lanougarède, jointly, had, it is admitted, fully the right to sell; they did so, and the minors Lepoigneur, to whom the price or part of the price of one of the houses thus sold had been attributed by the original deed of partition, received from the new purchaser, without the slightest contestation, that portion of the price which accrued to them.

But other Estates were sold at the instance of the assignees of the heirs Lanougarède; others at the request of heirs Lepoigneur, by "Folle Enchère."

The Estates fetched generally lower prices than the amount for which they had been sold when Lanougarède bought.

The practical result is this, that the heirs or their creditors, to whom, by the deed of partition, a claim was given not over the price of all the Estates, but specially over the price of certain specific estates, (a mode of partition and of settlement which all assented to,) are in danger of loosing a considerable portion of their share of the succession.

The heirs Lepoigneur feel this, and, therefore, contend practically, that the original scheme should be altered, their original collocation, specially on six out of the twenty three estates of the community Lanougarède, does not satisfy them, and their pretention is that the partition which has been ordered to be rectified so as to meet the new prices obtained, should be so rectified that their claim, instead of being limited to the price of the six estates originally attributed to them, should extend to the other estates, as well, in due proportion.

Now, what the Notary has done, in obedience to the Rule of Court, is this: he had, for his data, the original deed of partition accepted by all, confirmed by the Court; he had before him the settlement by which, estate A. must go to the share of *Marcus*; estate B. to the share of *Junius*; he had for estate A. a price of, say $15,000 instead of the original price of say: $20,000; he dealt with each Estate separately kept in view of the original mode of settlement, but put aside the claims that the new price of, say $15,000 did not cover; exactly as the Master of the Court would do when having before him a final "Ordre," and a reduced price, he preserves the first and prior collocations, and excludes those that the reduced price cannot cover.

The Notary has, also, whilst refusing to shift the several attributions as they had been settled by the deed of partition, refused to attempt to

disturb the "Ordres" for the distribution of the prices of sale, as finally closed by the Judgment of the Master of the Court.

The minors Lepoigneur object to this, and say that they have a right to be collocated on the lump of the property, supporting, if need be, their share of the loss, but that they cannot be compelled to keep their old collocations, the value of which has been greatly reduced.

They have brought their pretentions, good or bad, to a practical test. One of the houses bought previously by Lanougarède, and sold by his assignees, was purchased at the bar by one Vincent Georges, who was ordered by the Master to pay his purchase price to the Oriental Bank and the Chartered Mercantile Bank, creditors having hypothecs on the property; but the minors Lepoigneur have given notice that they objected to the payment of the Bordereau of collocation, inasmuch as they allege they have a right of "Folle Enchère" in and over the house in question.

Now, the house in question is not one of those the price of which was, in the deed of partition, attributed to the Lepoigneur branch.

Vincent Georges, although ready to pay, paused when he received this opposition, and the Banks, thereon, applied for a certificate of "Folle Enchère" which the Master ordered to issue notwithstanding the contention of the heirs Lepoigneur, as disclosed by their opposition. Vincent Georges appealed to this Court, and was allowed to pay the money into Court, or upon security given, the question of interest and costs being reserved until the pretentions of the heirs Lepoigneur had been tried on their merits.

We notice this circumstance which is incidental to the present general application; because it was mainly throught it that the respective contentions of the minors Lepoigneur on the one hand, of the assignees supported by the Banks on the other, came fairly before the Court.

The issues are, now, much narrowed. The minors Lepoigneur assume this position. As heirs of Mme Lanougarède, we are creditors of Lanougarède or assignees; we have not been paid; we have a right of 'Folle Enchère' not only in respect to the Estates allocated to us by the deed of partition, but in respect to the other Estates as well allocated to us by the deed of partition. The Notary was wrong when he rectified tho original deed of partition, not to have redistributed the whole lump according to the proportionate interest of all the "co-partageants;" his process of considering the original allotments as final, is unjust.

The assignees and the Banks answered: to a right of "Folle Enchère" you have, and have used it where better creditors than yourselves had not already done so over the Estates of which the price was allocated to your share; over the others you have no right whatsoever, or whatever rights you had, if any, you have lost by your own free will and choice. The Notary was right not to alter a scheme of partition which you, and all had assented to; which a final Judgment has confirmed. The sole powers he had, he has fairly and fully exercised.

There is in this cause a fact, which seems to clear away a good deal which appeared hazy or nebulous, if we view it, as it should be viewed, in a plain, straight forward way. The deed of partition of the joint-Estate of Lanougarède and wife, has been approved by all the parties and homologated by the Court, upon the conclusions of the "Ministère Public." A more solemn judicial confirmation of a deed of partition, our law knoweth not; every official intervention which that law requires, is found here; every formality to reach the final decision has been fulfilled, and unless a special act of the legislature were enacted, in every case of partition, to give validity to the same, it is impossible to conceive in what way, under our law, a deed of partition between co-heirs, or co-proprietors can be more solemnly sanctioned.

By their own will, by the further consent of the Law-Officer of the Crown, by the final Judgment of the Court, the heirs of the late Mad. Lanougarède had shared between themselves, and in the mode, and under the conditions stipulated by themselves, the Estate jointly held in her life time by the deceased lady and the husband who survived her. By that deed and that Judgment, the minors Lepoigneur, the only heirs of Mad. Lanougarède, who did not accept Mr. Lanougarède's succcssion, as her succession had been accepted, were to receive their share of the Estate of the late Madame Lanougarède, out of the sale price not of all the real property, but of certain specific Estates. The consequence was that the sale price of the other Estates which was not allotted to the heirs Lepoigneur, was made over to the other heirs of Madame Lanougarède, or to Lanougarède, himself, who having become the purchaser of all the Estates at the bar, discharged by confusion the price of those which had been allotted to him for his moiety in the community. On what principle of justice could the heirs Lepoigneur or any other branch of heirs, after final confirmation of that deed of partition, repudiate the same, now, because by some untoward circumstance, the lot they were then content to receive, the property they have chosen and selected as security for their rights, has fallen in value and has not fetched; when resold, the same figure it reached before?

Surely they have a remedy, if they have not waived or lost it; but that remedy is not the repudiation of a contract, which, if it stood unsupported, would, probably, command the sanction of the Court, but which is supported by a Judgment which has given to it the weight and force of a "res judicata."

Let us suppose that the Estates, instead of being all bought by Lanougarède, had been bought by divers parties, and that some of the purchasers bound to pay according to a deed of partition, had paid in obedience to their contract, on the faith of a partition assented to by the parties, and affirmed by the Court, could such purchasers be, now, exposed to see their property taken away from them by "Folle Enchère" or otherwise, because one heir who was to receive his share of another Estate, had found that share

reduced or lost? But if Lanougarède has bought, Lanougarède has paid to himself the price of those Estates which the deed of partition allotted to himself. Those who dealt with him, knowing this, knowing that on such Estates there was no encumbrance, no charge, that they were Lanougarède's own, would lend their money, and thus far, at least, and saving the question of warranty which it shall be our duty to examine, presently, ought not to be exposed to find their contract vitiated or their rights endangered by heirs who have previously accepted other securities in satisfaction of their claims.

That is not only just and true, because it is right that effect be given to contracts which the law allows; but in matters of partition, the Code (Art 883) distinctly enacts it; by that partition and the operation of the Article 883, the heirs Lepoigneur, whilst held to be sole proprietors of that which is allotted to them, are held never to have been proprietors, at all, of that which is not allotted to them. The consequences of that principle of our law, that a partition has a declarative but no translative effect, are of great and varied importance; for instance, the coheir or communist has not a vendor's right; he has not, therefore, the resolutory action; he has, only, the privileges conferred by Arts. 2,108, 2,109, of which we shall speak anon, and this doctrine which is a corollary of the rule of Art. 883 is now beyond doubt. The logic of the law shows it, and it is taught or laid down, inter alia, by MERLIN, *Repert.* verbo. *Licitation*; POTHIER, GRENIER, TROPLONG, *Priv*: HYP: II, No. 291, and amongst many decisions to that effect, we may cite that of the Cour de Cassation, 29th Sept. 1829, in *Dressargues* v. *Créanciers Lafargue*, and that of the Cour de Paris, 21 April 1830, in *Folcad* v. *Veuve Gruintzens*.

The stipulation in the conditions of sale to Lanougarède, that the purchaser would suffer a "Folle Enchère" if he did not comply with the conditions, is perfectly valid and has been carried into effect; the unpaid creditors of Mr and Mrs Lanougarède had sold some Estates by "Folle Enchère;" the heirs Lepoigneur, themselves, have done the same; but where the conditions have been executed, the "Folle Enchère" fails. If Lanougarède was bound to pay to A. and did not pay, A. had his right of "Folle Enchère;" not where he was bound to pay to himself or to B; and paid himself or paid B; after the deed of partition, A who had accepted other allotments, has no right of "Folle Enchère" as to the Estate of which the price is finally attributed to B. or to Lanougarède, himself. Here, Lanougarède has paid by confusion; he has complied with his contract; with the special conditions of sale. The apparent difficulty arises from this, that the heirs Lepoigneur would fain consider the 23 different sales as one sale; the 23 "Cahier des Charges" as one "Cahier des Charges," overlapping one another, and each carrying its effect and its force over Estates for which they were neither made nor intended. But that is a mistake in law; Estate A might have been purchased by *Marcus*; Estate B by *Junius*, and surely *Marcus* would have had nothing to do but with his own covenant; *Junius* no conditions to comply with but those which regulated his purchase. The fact that Lanougarède purchased all the Estates does not alter the position of things; under one sale, he is liable to one creditor, under another sale to another creditor; but there is not a general amalgamation of conditions, rights and liabilities.—And it must not be supposed, under the cloak of false equity, that the law is harsh or severe; coheirs and "copartageants" have rights, just as great, just as practical, as the vendor's rights which they have not; they have the "copartageant's privilege given them specially by arts. 2,108.2109; privileges sufficient to all intents and purposes, provided they be properly guarded and protected.

It was also urged that the heirs Lepoigneur or rather some of them, were minors when the deed of partition was homologated. Ivanoff Lepoigneur was of age, and, like all the other heirs of Lanougarède, accepted his succession. Minors are protected by the law; if they were not, they would not be, as such, heirs under privilege of inventory; but minors are protected by the law, within the fair limits of common sense, and common equity. Protection to them does not mean spoliation of others, a permanent danger to others. Because one of the several co-heirs is a minor, the law does not compel, except under special agreement, the other co-heirs to remain joint proprietors with the minor; and therefore the minor's guardian intervenes, in some cases a family council, besides; in very many occasions the opinion of the Procureur General, the interference of the Court or a Judge is required, before an act or deed can be binding upon the minor. But when the formalities which, in each special case, the law directs, have been fulfilled, and often without any other formality that the guardian's intervention, the minor is bound as majors are bound. Otherwise when would successions be wound up, settlements effected, or payments even made? "Quod facit tutor, facit pupillus," is an acknowledged principle of our law; whether the law could be or should be more stringent, is a question on which we have our own views which it is not necessary in this case to propound; but coheirs, creditors, third parties under any title or name, must be allowed to deal with security even when a minor is interested; and the guardian is in the field to protect the minor, either alone, or with the further assistance of his ward's friends, or the superintendence of the "Ministère Public" and Judge. This case is one out of many which are not suffered to pass unchallenged when any body is interested in discussing their data, or disputing their conclusions.

We must now turn to the question which, to us, is the one on which the case must turn.

The deed of partition is complete, and finally binding; but is it right that co-heirs or co-proprietors entitled to a proportionate share of the Estate, should lose their rights or part of their rights, when the share allotted to them turns out to be of lesser value than it was thought to possess?

When parties consent to a mode of settlement, they are presumed to have consented to that which they deemed proper and just. But the law, for the better protection of co-heirs and 'copartageants,' has conferred upon them, in lieu of the

vendor's privilege which the economy of that law swept away, another special privilege for the proper adjustment of their claims, a privilege just as effective as the other, the privilege of the "co-partageants." But, as the rights of third parties had to be protected, likewise; as it was necessary to guard conveyances and transactions of every kind from unknown rights that might, by suddenly emerging, cause grievous wrong, the law has saddled the privilege of the "co-partageants" with the condition that it be inscribed in the Register of Inscription, within a certain delay.

Art. 2109 enacts that: "Le cohéritier ou copartageant conserve son privilège sur les biens de chaque lot ou sur le bien licité, pour les soulte et retour de lots, ou pour le prix de la licitation, par l'inscription faite à sa diligence, *dans soixante jours*, à dater de l'acte de partage ou de l'adjudication par licitation: durant lequel tems aucune hypothèque ne peut avoir lieu sur le bien chargé de soulte ou adjugé par Licitation, au préjudice du créancier de la soulte ou du prix."

By Ord. No. 36 of 1863, sect. 6, pargh. 2, the privilege is not done away with, but the delay of inscription is reduced to *forty five days*. The cause of this proviso is very plain; one of the very best provisions of our Codes, for the security, certainly for the information of third parties, is to be found in the system of Public Registers of Inscriptions and Transcriptions. There one may learn how he deals, what dangers may threaten his investments, what rights may interfere with his covenants. If a lender of money or purchaser of real property finds that Estate A sold by Licitation between *Marcus* and *Junius* has been bought by *Marcus*, he knows that he has no vendor's rights to fear; he goes to the Registers after the expiry of the legal delay for inscribing the other privilege and finds no Inscription there, he contracts, and fairly so without danger; for, where, in such case, could the limit be made to stop if allowed to extend beyond the term enacted by the law?

Who is to blame, if the privilege is lost from want of Inscription? Surely the "co-partageant," himself, who for motives best known to himself, family reasons, confidence in the value of his own allotted share, in his debtor, has waived a right which extended his privilege beyond his own share his warranty beyond his own debtor's personal solvency.

The copartageant or his assigns who have thus lost their privilege, have still a personal right, which may, yet, be secured by inscription; but which, like ordinary inscriptions, will rank according to its date, but without any superior retroactive privilege. Art. 2,113 enacts: "Toutes créances privilégiées soumises à la formalité de l'Inscription, à l'egard des quelles les conditions ci dessus prescrites pour conserver le privilège n'ont pas été accomplies, ne cessent pas, néanmoins, d'être hypothécaires; mais l'hypothèque ne date, à l'égard des tiers, que de l'époque des inscriptions qui auront dû être faites, ainsi qu'il sera ci-après expliqué."

The text is clear the authorities no less, to show that the day of the adjudication is the terminus *a quo*, and not the day of the homologation of the Deed of Partition.

Papon v. *Faugère*, (Bordeaux,) 16th June 1831, D. 31. 2. 212. *Chanteron* v. *Perret & Villem*, (Lyon.) 21st Feb. 1832, D. 32. 2. 146. *Her. Bénard* v. *Créanciers Bénard*, (Paris), 7th Feb. 1833, D. 33. 2. 203. *Gallois* v. *De Montfleury*, C. Cass. 15th June 1842. S. V. 42. 1. 63.

This latter decision is quite in point and lays down the doctrine above maintained as against minors. "Attendu que pour l'obligation de prendre inscription dans les 60 jours, à dater du partage ou de l'adjudication sur Licitation, la loi ne distingue pas entre les majeurs et les mineurs." In the case *Héritiers Midard v. Galopin*, C. Cass, 23d July 1839, S. V. 39-1-560, we find very cogent reasons: "Attendu que les dispositions de l'Article 2,109 démontrent, en effet, que l'attente d'une liquidation définitive n'a nullement frappé ses rédacteurs; ce n'est pas en effet l'époque du réglement des parties sur leurs retours et répétitions respectifs qu'ils donnent pour point de départ à l'inscription, mais celle de l'adjudication; et cependant *ils n'ignoraient* pas qu'après l'adjudication, il reste presque toujours des compensations et des calculs qu'une liquidation est seule de nature à établir. Ce qui a frappé les législateurs, c'est la cessation de l'indivision; c'est la transformation d'un droit commun à plusieurs, en un droit exclusif; c'est cette attribution de la propriété qui, ouvrant un ordre de choses tout nouveau, place les intéressés en demeure de s'inscrire."

The same reasoning, almost *ipressimis verbis*, we find in TROPLONG'S commentary, Vol. I *Priv. et Hyp.*, No. 318 bis. We say nothing as to "lesion;" besides other reasons there is no proof that at the time the partition was made, the share allotted to the heirs Lepoigneur was of less value than the share allotted to the other "co-partageants" (art. 890.)

There is, besides, no action in rescision or cancellation, before the Court (arts, 887 and 888.)

The conclusion to which we have arrived is:

That the deed of partition finally homologated has settled the respective rights of the co-heirs, and determined on what specific Estates each co-heir or "co-partageant" should receive his share of the Estate.

2o. That the deed of partition and Judgment homologating the same has the same binding power for minors as for majors.

3o. That the minors Lepoigneur have no right of "Folle-Enchère" and no vendor's rights over the property allotted to Lanougarède for his share.

4o. That, as a fact, they have not inscribed, within forty five days, their privilege as "copartageants."

5o. That in law, they have lost the privilege, and have no right but the right of warranty under Art. 2,113, but with no better privilege than ordinary hypothec creditors.

6o. That this being the case, the Notary was right, when ordered to rectify the original deed of partition, since the new sale prices did not reach the amount of the original sale prices to Lanougaréde, to do so in the plain usual common sense way.

7o. That no new right or other new privilege is proved to have arisen that could induce the Notary or authorize him to interfere with settled rights.

8o. That the Notary was right not to assume a power he had not, that is, interfering with "Ordres" as settled by the Master, the proper officer of the Court, for such matters.

And accordingly we are of opinion that the objection of the minors Lepoigneur to the homologation of the rectification of the deed of partition, are to be set aside, and that they shall take nothing by their application to have the whole matter remitted back to the Notary, to be dealt with in the way they maintained.

We are of opinion that the Plaintiffs should have Judgment with costs, against the minor Victor Lepoigneur, in his name, and as universal legatee of Isabella Lepoigneur.

The assignees, Defendants in this action, we hold to be also entitled to their costs against the unsuccessful party.

As to the intervening parties, their intervention is admitted according to the provisions of Art. 882; but at their own expense; they shall neither receive nor pay costs.

SUPREME COURT.

TÉMOINS, — VACATIONS.

WITNESS,—COSTS.

Before:

His Honor Sir C. F. SHAND, Chief Judge, and
His Honor JUSTICE BESTEL.

Motion *in Re*

LEWISON

versus

THOMAS, LACHAMBRE & Co.

24th August 1869.

When a witness is summoned in a cause, the party calling him, must, generally pay his taxed costs, although an Appeal to the Privy Council may have been entered.

The witness is not bound to wait the issue of the Appeal; the result of it will fix which party, as between themselves, is ultimately liable to pay those costs.

SUPREME COURT.

ACTION EN RESTITUTION D'UN IMMEUBLE, — PREUVE,—AVEU JUDICIAIRE,—RÉMÉRÉ.

Circonstances d'après lesquelles la Cour a refusé de faire droit à une demande en restitution d'un immeuble transféré par un débiteur à son créancier avec convention verbale de réméré.

ACTION IN RESTITUTION OF AN IMMOVEABLE PROPERTY,—EVIDENCE, — ADMISSION BEFORE A COURT OF JUSTICE, (AVEU JUDICIAIRE)— EQUITY OF REDEMPTION (RÉMÉRÉ).

Circumstances under which the Court has refused to order the restitution of an Immoveable Property transferred by a debtor to his creditor, under a verbal agreement of equity of redemption (Réméré).

HITIÉ,—Plaintiff,

versus

RIVET,—Defendant.

Before:

His Honor JUSTICE BESTEL and
His Honor JUSTICE COLIN.

P. L. CHASTELLIER,—Of Counsel for Plaintiff.
V. LAVAL, —Plaintiffs' Attorney.
E. J. LECLÉZIO, —Of Counsel for Defendant
A. PISTON, —Defendant's Attorney.

2nd July 1869.

On the 17th December 1849, by a deed under private signatures, duly registered and transcribed, Joseph Gourdin sold to Léonce Rivet, the Defendant, a house situate in Pamplemousses road, Port Louis, for a price therein stipulated to have been paid cash.

On the 29th September 1853, E. Hitié, the Plaintiff, and Félix Laurent, were declared bankrupts.

Léonce Rivet, above named, and one Boucherat, his partner, affirmed a claim of such partnership against the Bankruptcy of Hitié and Laurent.

Afterwards, Léonce Rivet, being called as a witness in the matter of the said Bankruptcy of Hitié and Laurent, was examined concerning the sale made to him by Gourdin, as aforesaid, of the Immoveable Property situate in Pamplemousses road. Léonce Rivet, amongst other things, stated as follows:—

"One or two years before the Bankruptcy of Hitié and Laurent, I had under my name a property. Mr Gourdin placed it under my name. Mr Hitié was then my debtor to the amount

two thousand, two hundred and a few dollars. Mr Hitié told me that I was to replace it under Mr Hitié's name as soon as I should be paid.

....

" When I am paid by Mr Hitié the latter will become the owner thereof.

.....

" It was long before I joined Mr Boucherat that Hitié was my debtor in the amount mentioned by me of two thousand two hundred and a few dollars. This sum is a personal claim of mine, independant of my share in the partnership. I believe, as far as I am concerned, that the house was conveyed to me for a sum of from fifteen to two thousand dollars.

I would have no difficulty to retrocede the house to Mr Hitié were he to pay me, inasmuch as I do not enjoy that house."

The said immoveable property was not inserted in the balance sheet of Hitié, amongst his assets, neither before nor after the examination of Léonce Rivet.

On the 16th January 1860 the bankruptcy of Hitié and Laurent was superseded and the said Hitié and Laurent were put in possession of all their property.

On 11th January last, E. Hitié entered the present action, claiming from L. Rivet the restitution of the house above mentioned. The case was argued before the Supreme Court on the 17th March following.

JUDGMENT.

The Declaration, in this case, sets forth that on 17th December 1849, the Plaintiff caused to be placed and put under the name of the Defendant, Léonce Rivet, by one Joseph Gourdin, an immoveable property with the buildings and appurnances thereof, situate in Pam, lemousses street, Port Louis. That the Plaintiff and one Félix Laurent were declared bankrupts on the 29th September 1853. That on 23rd May 1859, the Defendant admitted before the Commissioner in Bankruptcy that the immoveable property in question was the property of him the Plaintiff.

That on the 16th January 1860, the adjudication of Bankruptcy aforesaid was superseded in virtue of an Order of the said Commissioner, and the Plaintiff and Félix Laurent were put in possession of all their property.

That the Plaintiff has often requested but the Defendant has hitherto declined to restore to the Plaintiff the Immoveable property in question. That an action has therefore accrued to the Plaintiff to have and demand of the Court, here, Judgment against the said Defendant, to restore and give back to the Plaintiff, the full and quiet possession of the property in question, or to pay the sum of $3,000 value of the said property and appurtenances.

The Defendant traversed generally the statements made by the Plaintiff, and specially that if the facts alleged were true, the Plaintiff would have merely acted in provision of his bankruptcy, and in order to defraud the rights of his, the said Plaintiff's creditors; which fraudulent act the said Plaintiff is not entitled by law to allege.

The Defendant further pleaded that the sale of the real estate in question, was made to him the Defendant, by Joseph Gourdin himself.

The evidence in this cause, so far as it touches the real convention between the parties, is very meagre indeed; in fact, it depends, almost entirely, upon the statement sworn to by the Defendant before the Court of bankruptcy. It is perfectly clear that the pleas, such as they are framed, are untenable; but it is no less clear that the Plaintiff must make out his case.

The general pleas are bad when they deny the main facts alleged by the Plaintiff; the special plea is not borne out when it alleges fraud on the Plaintiff's original transaction.

The evidence shows that it is true that some 8 years before his bankruptcy, the Plaintiff, then a debtor to the Defendant, bought a house of Gourdin and had the house nominally conveyed to the Defendant, evidently as a security for the Defendant's claim upon him.

In fact it was a kind of sale to the Defendant, upon an equity of redemption; the Plaintiff being entitled to receive back the house when he had paid the money he owed. There is no fraud there; there is no undue preference at all shown in this case, judging of the facts according to the evidence before us, and that evidence we gather from the statement of the Defendant, himself.

It is also perfectly true that the Plaintiff, as bankrupt, has succeeded in paying or obtaining a discharge from his creditors, and his bankruptcy has been duly superseded, so that no claim can be set up against him by the Defendant; for the debt proved by Boucherat, is the joint interest of Boucherat and the Defendant.

If the case stood solely in this light, the Plaintiff must succeed.

But can we consider the debt to secure which this house in question was, upon its purchase from Gourdin, put under the Defendant's name, as a debt which came within the operation of the Bankruptcy? or was it not, rather, a foregone conclusion, a thing of the past, a debt already paid in a special manner, which could not form part of the bankrupt's liabilities at the time of his bankruptcy, just because it has been paid?

A debt is not the less paid by an actual assignment of a just consideration, because by the operation of an equity of redemption, the debtor reserves to himself the right to take back the specific consideration, or otherwise satisfying the debt. The equity of redemption is in favor of the debtor assignor, but cannot be used by the creditor assignee. The latter is paid, paid in a special manner he has consented to, but absolutely paid if the debtor does not choose to use the powers he has reserved to himself.

Now, we do not know what may be behind the curtain ; we have, in support of the Plaintiff's allegations, that the house was to be restored to him ; only the Defendant's statement. The Defendant admits the fact, but saddles his admission with the further statement that he was bound to restore, on being paid his money, the debt which this sale was meant to discharge. If the Defendant's release of the Plaintiff at the bankruptcy is put forth, that release operates as a discharge of all debts existing at the time of the Bankruptcy, and paid in a special manner.

And the Defendant's statement upon which we must again fall back, is distinctly to the effect that " at the time the house was made over to me, Mr Hitié was my debtor up to upwards of $2,200 and a few dollars." and again. " This sum is a particular claim of mine independant of my share in the partnership." And again : " It was long before I joined Mr Boucherat that Hitié was my debtor in the amount mentioned by me of $2,200 and a few dollars."

So far as we can see, what further evidence we have, rather goes to corroborate this statement than to rebut it.

In fact, the claim proved at the Bankruptcy was the partnership claim, the joint claim of Boucherat and Rivet.

In fact, the house does not appear as part of the assets of the bankrupt. If the house had not, subject to the aforesaid equity, really been conveyed to satisfy a debt personal to Rivet the Defendant, the house would have still been the property of Hitié, and Hitié would have entered the same as part of his Assets. He does not do so, and why ? Evidently because two years, at least, before, the house had ceased to be his property. Rivet does not prove his personal claim, whilst the partnership claim is proved. Why ? because the personal claim is discharged by the transfer of the house, subject to the same equities, but the partnership claim is not paid at all.

Subsequently, Hitiéis fortunate enough to obtain a discharge from his creditors. We are prepared to give the fullest force to that discharge, fairly and publicly obtained with the sanction of the Commissioner ; but we cannot give it the force that will revive a special claim discharged in a special way before the Bankruptcy, in order that the special claim so revived should disappear under the general discharge and the special consideration revert to the Bankrupt, or, at least, before we do so, we must have clear proof that the parties intended that this should be their case. And we have no such proof. It is again very true that all this rests upon the evidence of the Defendant, himself, before the Court of Bankruptcy ; but that evidence is brought in by the Plaintiff, who gathers from it, and from it alone, that the house was in reality bought by him the Plaintiff, and by him put under the Defendant's name. Subtract the Defendant's statement, the Plaintiff fails entirely in the essentials of his case ; why then should not believe that part of the Defendant's statement which explains the cause of the transfer, as well as that part from which we gather the fact of the transfer ?

Why should we divide the statement, the judicial admission ? We may not do so, and we think the evidence gathered from the record of the case in Bankruptcy rather supports that view of the case. The Plaintiff owed money to the Defendant and paid him by buying a house in his name, reserving to himself the right of recovering the same if he paid in money the sum he owed. That took place long before the Bankruptcy; a contract apparently complete long before the Bankruptcy ; has nothing to do with the Bankruptcy so far as we can see, and therefore is not affected by the general discharge which took place of all debts existing at the time of the Bankruptcy.

It is a pity that the pleas instead of dealing with the question broadly and on its legal bearings, denied facts which the Defendant had admitted, suggested fraud of which there is no proof, and which, if true, would have made the Defendant a *particeps fraudis*.

But as the case stands, compelled to decide upon the meagre evidence, the very few important facts before us, we must come to the conclusion that the Plaintiff has not made out his case. We shall give Judgment, dismissing the action with costs, unless the Plaintiff elects to be nonsuited.

BAIL COURT.

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'AJOURNEMENT,—DÉLAI.

Lorsque les délais prescrits par les Rules of Court n'auront pas été observés dans la signification soit d'une plainte soit d'une défense, il sera au pouvoir du Juge d'annuler le dit acte de procédure ou d'accorder un renvoi.

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PLAINT,—NOTICE OF DEFENSE,—DELAY.

When a Plaint with summons or a Notice of defense has not been served on the other side, within the statutory delays, the Judge has power either to annull the proceedings or to grant a postponement where no substantial right is prejudiced thereby.

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TREMOULET,—Plaintiff,

versus

DUCLOS—Defendant.

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Before :

His Honor JUSTICE COLIN.

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L. ROUILLARD,—Of Counsel for Plaintiff.
V. PRAGASSA, —Plaintiffs' Attorney.
G. GUIBERT, —Of Counsel for Defendant.
F. ROBERT, —Attorney for same.

—

7th September 1869.

In this case, an objection was taken, by the Defendant, to the validity of the Plaint with summons. It appears that the Plaint was served on the 27th day of July last, and was made returnable on the 3rd August. It was argued that the delay was much too short, and that the Plaintiff should be nonsuited. The Plaintiff answered that even if the delay were too short, there should be no nonsuit, but an adjournment upon such conditions as to costs that the Court would think just and proper under the circumstances.

By section 2 of the Rules of Practice, a copy of the Plaint should be served on the Defendant, eight clear days before the sitting of the Court at which the summons shall be returnable.

Rule 134 does not repeal but amends Rule 2 by shortening the delay from 8 to 4 clear days.

But, Rule 134 is, itself, expressly revoked by Rule 158 which makes no provision as to delays, so that Rule 2 which never was repealed is the Rule which determines the delays to be observed in cases similar to the one before the Court.

Eight clear days must elapse between the service of the Plaint, and the return.

No Judge's Order is found, in this case, shortening the delay.

The Defendant has neither expressly nor impliedly waived the objection which was taken in "limine litis."

The summons is, therefore, abortive, and should be declared void.

But the Plaintiffs applies for and adjournment which shall give the Defendant the time he was entitled to obtain, and submits himself to pay the costs.

It was a questio vexata, under art. 61 of the Code of Civil Procedure, whether a summons made returnable before the expiry of the delay prescribed by law, was to be treated as a nullity. We must, however, look in this case not so much to art. 61, as to general Rules and Orders of Court.

The rule seems very positive; but, at the same time, we have, under the general Rules, very extensive powers of amendment. I am inclined to use those powers liberally, not only because it is hard that the mistake of the practitioner should become injurious to the suitor, but also because trivial objections should not be encouraged.

At the same time, this can hardly be called a trivial objection. A Plaintiff may so easily and readily obtain from a Judge, leave to shorten delays when he shows good cause, that it would be unwise to allow uncontrolled latitude, of which the result would be great looseness of practice, and often, in the words of Lord Lyndhurst, in *Rex* v. *Gilbert*, (2 CROMP. & M. 190) a *bounty or negligence.*

There is authority to shew (COX & LLOYD, C. C. Prac: 332) that when a Defendant has not given sufficient notice, in point of time, of a special defence which requires notice, the Judge may adjourn the case, in order to enable him to give the required notice.

This Rule the application of which is left to the discretionary power of the Judge, is just; for, otherwise, the Defendant might be deprived of a good and substantial defence.

I am not, therefore, prepared to say that I am in every case bound to refuse an adjournment the effect of which would be to cure an irregularity, when the real merits of the opponent's case are not thereby prejudiced. In this case, however, the summons is bad; if it is set aside, the Plaintiff may begin again; his cause on the merits, is not endangered; costs, he offers to pay; he would, in any case, have been ordered to pay costs.

Practically, there is no great difference; but when I consider that upon that first process every other legal delay mainly depends; that many difficulties are avoided by annulling a summons which is confessedly bad, and that no substantial right is prejudiced thereby, I have come to the conclusion that without deciding whether the power of amendment extends to a case like this, I should decline to interfere. The Summons is bad, and I annull it with costs; the Plaintiff may elect to be nonsuited.

SUPREME COURT.

SÉQUESTRE,—SOCIÉTÉ, — ADMINISTRATION,—CONTESTATIONS ENTRE ASSOCIÉS.

SEQUESTRATION,—PARTNERSHIP,—MANAGEMENT,—CONTESTATIONS BETWEEN PARTNERS.

In Re:

GALDEMAR FRÈRES,—Plaintiffs,

versus

WIDOW DIORÉ & ORS.,—Defendants.

Before:

His Honor C. F. SHAND Kt., Chief Judge and His Honor G. B. COLIN.

P. L. CHASTELLIER,—Of Counsel for Plaintiffs.
F. VICTOR, —Plaintiffs' Attorney.
E. PELLEREAU, —Of Counsel for Defendants.
J. MERCIER, —Defendants' Attorney.

7th September 1869.

We are of opinion that the Court having dissolved the civil co-partnery between Widow Dioré, J. J. Wilson and Galdemar frères; and

Widow Dioré having appealed to the Privy Council from the Judgment of the Court, the Estate *Richfund* ought not, to the great prejudice of both the innocent co-proprietors and the creditors, to be suffered to go to ruin.

Galdemar frères, the co-proprietors who have been successful before this Court, were, by the deed of co-partnery, to receive the sugars, sell them and apply the produce to pay the notes made for the support of the Estate.

We are of opinion that, subject to the proviso hereinafter mentioned, they should be authorized to receive the crop, pay off with the produce of the joint-Estate, the debt of the joint-proprietors for which the " Folle Enchère " issued, or pay off the debt, at once, if they have private means of their own, and reimburse themselves with the proceeds of the sugar.

That sum, *i.e.* $15,000 or thereabouts paid, there will be no necessity to carry on the sequestration which Messrs. Thomas, La Chambre & Co. have undertaken. Those gentlemen have, by law, a privilege in and over the crop of the Estate ; it is just that one of the co-proprietors pays them, such co-proprietor should reimburse himself with the proceeds of the crop ; the sum taken out of the crop, to pay the sequestration account, will not vary, and the necessity for a sequestration come sooner to an end. The balance of the crop should be applied by Galdemar frères & Co. to pay : 1o. the promissory notes still due which were made by the joint-owners of the Estate, for the working of the Estate ; 2o. the promissory notes already due and paid by Galdemar frères & Co's own money. Galdemar frères & Co. claim no privilege, so that the creditors will not only not suffer, but be actually benefited. Those whose claims may be due, may at once, if not paid, make good those claims ; those whose claims are not due will, by the fact that a large sum of money is paid off, find their own position bettered.

Besides, it is the right and duty of owners of Estates to apply to the payment of debts already due the proceeds of the crop, if such proceeds have not been specially burdened by some legal encumbrance.

It is clear that Mrs Widow Dioré having lost, before this Court, the case touching the dissolution of co-partnery, and having, by her appeal *a priori* suspended the execution of the Judgment of this Court, no motion having yet been made for provisional execution, or suspension, is desirous that the crop should be received by others than Galdemar frères. We should be ready to hear, between this day and next Tuesday, any proposal made by her which will, at the same time, pay off a debt for which a " Folle Enchère " is being sued at the request of her own minor children, and provide for the payment of the working expenses past and present of that sugar Estate ; but whilst we leave, so far, this matter open, we must come to a conclusion which we shall vary only by substituting some other name to that of Galdemar frères, if this can be effected.

We, therefore, order : 1o That the crop be consigned to Galdemar frères, provided Galdemar frères pay off the claim of the minors Dioré, for which the " Folle Enchère " is sued : 2dly the sequestration account of Thomas, Lachambre & Co.

We further order that the price of the sugars so sold shall be applied by Galdemar frères to reimburse themselves of the two above mentioned payments and shall, afterwards, be applied to pay : 1o the promissory notes still due for the working of the Estate, and the current expenses of the Estate ; 2o the promissory notes specially made by Wilson and by Widow Dioré, in terms of the articles of co-partnery for the working of the Estate.

The balance, if any, shall be brought up to this Court, to be applied as the Court shall direct, according to the just right of all parties, and according to the circumstances hat may prevail when the Order is applied for, circumstances that we are unable to foresee at the present moment.

We also order that the Books of the Estate and the Books of Galdemar frères, relative to the Estate *Richfund*, be kept at the disposal of the co-proprietors, and also that, if requested by either of the co-proprietors, Galdemar frères do within eight days from the requisition to them, file, at the Registry, copies of all the sales of Sugars by them made, and accounts of payments by them made in pursuance of and in obedience to this Judgment. Thomas, Lachambre and Co, will receive their costs upon this motion ; the costs of the joint-proprietors of the Estate will be reserved until at the end of the crop it is known whether there will be a balance or not. The costs of the creditors who have been summoned to appear shall be considered as motion costs and paid out of the proceeds of the Sugars, those creditors who were, but are no longer such, will neither pay nor receive costs.

SUPREME COURT.

SUCCESSION,—ACTE DE PARTAGE,—HOMOLOGATION,—CONTESTATIONS,—ACTION PRINCIPALE.

Lorsque dans un acte de partage, l'une des parties en cause fait une réclamation qui n'est point admise par tous les autres co-partageants, et oblige le notaire à référer ceux-ci aux magistrats compétents, cette réclamation peut être jugée sur la demande en homologation du partage tel qu'il a été établi par le notaire, à moins que la Cour n'ordonne qu'elle lui soit présentée par voie d'action principale.

SUCCESSION,—DEED OF PARTITION,—HOMOLOGATION, — CONTESTATIONS, — PRINCIPAL ACTION.

Where, in a deed of partition, one of the parties to such deed sets forth a claim which is contested, and all the parties are referred by the notary to the

proper jurisdiction, such claim may be adjudicated upon by the Court, on a Demand for the homologation of the deed of partition drawn up by the notary, unless it be decided that it ought to be brought before the Court by way of a principal action.

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WIDOW A. MARIETTE AND ORS.,—Plaintiffs,

versus

PIAT AND ORS.,—Defendants.

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Before:

His Honor Sir C. F. SHAND, Chief Judge and His Honor Mr. JUSTICE COLIN.

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E. J. LECLÉZIO,—Substitute Procureur and Advocate General appearing for the "Ministère Public."
G. GUIBERT, —Of Counsel for Plaintiffs.
J. GUIBERT, —Plaintiffs' Attorney.
L. ROUILLARD, P. L. CHASTELLIER, } Of Counsel for Defendants.
A. J. COLIN, V. BOULLÉ, } Defendants' Attornies.

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7th September 1869.

By a Plaint dated May 29th 1869, the Plaintiffs who are legatees " à titre universel " of the late Coralie Piat, called upon the Defendants, who, likewise, claim under the Will of that deceased Lady, to appear before the Court to shew cause why the Court should not hear the parties to the deed of partition of the Estate of the said late Coralie Piat, the said deed dated March 17th 1869, and drawn up by Pelte, Notary Public, upon the objections raised by Edouard Piat, acting as legal administrator of the Estate of his minor children legatees of the late Coralie Piat; and also by Edouard Piat Junior, a legatee of the late Coralie Piat, to the aforesaid deed of partition; and further to shew cause why the Court should not dispose of the said objections, and why should the Court rule and decide that the said claim is grounded in law and must be given effect to as binding upon all the legatees by universal title of the late Coralie Piat, the aforesaid deed of partition should not be referred back to the Notary, to be amended and rectified accordingly. And further why, at all events, the said Court should not consider that a partial rectification of the deed of partition is necessary as regards the parties who have admitted the claim of the said minors Edouard Piat and of Edouard Piat the son; and further why should the Court be of opinion that no rectification is required in either case, the said Court should not affirm and homologate the aforesaid deed of partition such as it stands.

It appears that when the Notary's scheme of partition was prepared and submitted to the interested parties who all claim under the Will of the late Coralie Piat, Edouard Piat Senior, on behalf of his minor children, and Edouard Piat Junior, on his own behalf, on 8th April last, objected to the aforesaid deed of partition, setting up a certain claim which they allege they held against the Estate of the late Coralie Piat. The claim was not a large one, the principal sum would be $1,100 for balance due on $5,500 and interest on that sum of $5,500 from the day that the *Beauvallon* land was sold to Vigier Latour & Dupin frères, such interest decreasing gradually in proportion to the payments made on account of that sum of $5,500 now reduced as aforesaid to $1,100. That claim, was at once, acknowledged by Mr Antony Colin as Attorney for Lecourt de Billot and wife and Jules Piat, by Henry Piat, Mrs Mariette, Nemours Bréard, Victor Desvaux, Prosper Allendy, John Piat, Arthur Lalouette, Alfred Montocchio and Edouard Piat.

The claim was objected to by Léonce and Victor Boullé, and Onézime Letellier, both in their own personal names respectively, and as in the name of the parties they represented.

The Notary, thereon, paused, and referred the parties to apply to the proper Jurisdiction.

The Plaintiffs have seized the court, by the Plaint aforesaid, of the respective contentions of parties. After the Plaintiffs had stated the above facts, the claimants supported their alleged rights into the examination of which it would be, now, superfluous to enter, because the objecting legatees took a point upon which the Court, after having heard the "Ministère Public," is called upon to pronounce.

Those legatees contended that the Court could not, now, enter into the merits of the case, but that the claimants should be sent back to make good their claim by a regular action at law.

It is perfectly clear, that when a deed of partition is sent up for the consideration of the Court, we have power to order that regular pleadings should take place whenever the circumstances of the case lead us to think that substantial justice requires it; but there is no law compelling the Court to have recourse to that mode of proceedings, whenever, from the statements made by the parties before the Notary and taken down by the Notary, by the tenor of the documents which brings all the parties before us, we are satisfied that the issues are already fairly raised upon the deed of partition and the subsequent Plaint.

The result of ordering the claimants to bring an action at law, a result which certainly one might arrive at in a complicated case, must be to keep in abeyance the rights of all the other parties to the deed of partition, heirs, creditors, legatees; for, we cannot homologate the deed of partition as it stands, inasmuch as the claim, if admitted or rejected, may materially change its import, and we cannot reckon upon a general consent, to keep back a sufficient sum to meet possible contingencies and divide the rest. In fact such a consent could not be safely given in every case.

Art. 837, Code Civil, regulates this matter, and refers us to the laws relative to our Civil procedure.

Art. 977, Civil Procedure, after directing the Notary as to what he has to do, enacts that " Si

le Juge Commissaire renvoie les parties à l'audience, l'indication du jour où elles devront comparaître, leur tiendra lieu d'ajournement. Il ne sera fait aucune sommation pour comparaitre soit devant le Juge, soit à l'audience."

The mode of proceeding, now, for partitions of property, is to call directly the parties either before the Judge at Chambers, according to the Chambers Ordinance, or before the Court, directly, according to circumstances; saving this which is sufficiently summary, the law imposes no other distinct formality. The law enacts no obligation to compel parties to resort to a long and expensive series of legal proceedings, when Justice can be, just as well, done by hearing them at once. In fact, what is the issue before us? the usual one. Shall this deed of partition be affirmed as it stands or not? No say the claimants; we have a clear right which most of our co-legatees admit; we are ready to make it good at once, as to those who object.

The objectors do not say: homologate the deed of partition, at once, notwithstanding the claim which should be repudiated.

They say: let the matter stand over until, upon action brought, the Court has decided upon the validity of the claim.

We repeat, cases may arise, probably often rise, where this would be the surest, and, possibly, the cheapest mode of proceeding; but this cause is not one of them; here the amount in dispute is small, the respective contentions of parties clear, the loss in time, perhaps in money to innocent parties, great if we delayed the case; and as no law compels us so to delay it, as the authorities sanction this course of proceedings, as independently of authority, the text of law points to a summary mode of procedure, we must, in conformity to the conclusions of the "Ministère Public," overrule the preliminary objection taken by Mr. L. ROUILLARD for his clients who must pay their own costs of the day. The other parties will have their costs of the day as costs of partition.

SUPREME COURT.

SUCCESSION,—LICITATION,—PARTAGE EN NATURE —APPEL D'UN JUGEMENT DU MASTER.

Lorsqu'un expert nommé sous l'empire de l'ancienne procédure en licitation a décidé que le terrain indivis entre les co-héritiers était partageable en nature, il doit être donné suite à la procédure commencée, bien que la nouvelle Ordonnance sur les ventes d'immeubles ordonne que toute Licitation "commencée" sous l'empire du Code de Procédure sera continuée conformément aux prescriptions du dit Code, et qu'aucune licitation ne sera réputée "commencée" que lorsque le dépot du Cahier des Charges aura eu lieu.

SUCCESSION,—LICITATION,—PARTITION IN KIND, —APPEAL FROM A JUDGMENT OF THE MASTER.

When an appraiser, appointed conformably to the old law on Licitation, had found that the property could be divided in kind, the mode of proceeding under the law must be followed up, although, by the new law, the proceedings of a Licitation "commenced" under the Code of Civil Procedure are to be continued conformably to the provisions of such code; and a licitation is deemed to have been "commenced" only when the memorandum of charges has been deposited at the office of the Master.

ANDRÉ AND WIFE,—Appellants,

versus

BÉTUEL & ORS,—Respondents.

Before

His Honor THE CHIEF JUDGE, and
The Hon. JUSTICE COLIN.

L. ROUILLARD,—Of Counsel for Plaintiffs.
A. J. COLIN, —Plaintiffs' Attorney.
E. PELLEREAU, G. GUIBERT } Of Counsel for Respondents.
A. BETUEL, A. ROHAN, } Respondents' Attornies.

7th September 1869.

This was an appeal against an Order of the Master of this Court, under date June 22nd 1869, which dismissed the present Appellants' application to set aside certain proceedings for the sale by licitation of real estates situate at Moka, and jointly held by the heirs Rouessart. The proceedings in licitation had been introduced by the Respondent Bétuel who alleged himself to be the creditor of Elysée Rouessart, one of the co-proprietors of the said real Estates. It appears that by a Rule of Court, dated 24th August 1868, to which the heirs Rouessart and Bétuel were parties, it had been already ordered that one William Mars should examine the same real Estates, and report whether such property could be conveniently divided in kind (en nature) between the co-proprietors, and that if they could, such division should take place; if they could not, then the sale by licitation thereof should take place according to law.

The Rule of Court is final. William Mars, in execution of the same, made a final report, on November 12th 1868, and he found that the Estates could be divided "en nature."

Our law prefers the division "en nature" to the sale by licitation of the real Estate; in fact the latter may not take place unless the former process cannot conveniently be adopted. Art. 827 Code Civil is peremptory. Also Arts. 976, 977, 978 Code Civ. Proced. (Court of Lyons, 30th Nivose, An 12). This was, accordingly, ordered as usual, and the Appraiser has reported that the actual division "en nature" can take place.

But it also appears that the Respondent Bétuel left the whole matter in abeyance until March 1869, when, notwithstanding the final Rule of Court aforesaid, and the appraiser's report, he filed, on 30th March 1869, a memorandum of conditions of sale, the object of which was to sell the Estates by licitation *de plano*, instead of following up the proceedings which he had himself instituted in the first instance, and which had been so far sanctioned by a Rule of Court which not only binds the other parties to him, but binds him likewise to the other parties.

André and wife, the Appellants, objected to Bétuel's scheme of ignoring completely the division in kind which the law requires, if it can be effected, the Rule of Court which had ordered it, if possible, the appraiser's Report to the effect that it was possible. They objected therefore, to the new proceedings; but the Master declined to set them aside, mainly on the ground that by the operation of the new Ordinance relative to Sales, No 19 of 1868, Bétuel was entitled to carry on fresh proceedings.

Hence the appeal entered against that Order, by André and wife.

JUDGMENT.

We are clearly of opinion that the new Ordinance has not set aside rights already vested in suitors at the time of its promulgation.

The right to divide "en nature," whenever this is practicable, is one which the law specially favours; the sale by licitation takes place only when the division "en nature" may not conveniently take place.

By a final Judgment of this Court, made before the promulgation of the Ordinance, this had been ordered, if found by an Appraiser then appointed, to be practicable.

There is nothing in the Ordinance which can possibly be construed as an interference with, still less as a repeal of the law which directs real estates to be divided in kind, if possible. There is nothing in the Ordinance which interferes with the right of suitors to avail themselves of Judgments already obtained when the Ordinance became law, although Judgments to the same effect and for the same object may be sought in another way for cases that have arisen since the Ordinance became law.

By section 104 of the new Ordinance, a Defendant in licitation has, now, to apply to the Master, by petition, to obtain an order staying the licitation so that a division in kind may take place.

That is the new mode of proceeding for cases that have arisen and may arise since the passing of the Ordinance.

The law is very much the same, but the procedure is somewhat reversed. But in the cause before us, the Court had, before the passing of the Ordinance, granted a rule which was never *rescinded*, but was on the contrary adopted, as final by all the parties, and that Rule had ordered the proceedings to take place as usual, according to the only way in which they could take place, that is according to the law then in force. That is "Res judicata." Why should the Master be applied to when the Order has already gone forth? What could the Master do now, that the Rule of Court has not done, so far as it goes? How can the Master be called upon to ignore a final Judgment of the Court, when the Court, itself, has no power to set it aside or rescind it, except by consent? Why this attempt to begin "*de novo*" that which is already done? We have no right to allow it; we find no practical use in allowing it, if we had the power. It was urged that although section 216 enacted that "the provisions of the present Ordinance are not applicable to any proceedings commenced prior to the time when the Ordinance should come into operation," yet, section 217 enacted that for all other sales by public competition before the Master, *i. e.* for all sales except sales by forcible ejectment, "proceedings shall be *deemed to have* commenced, if the memorandum *of charges has* been filed."

In this case, it was argued, the memorandum of charges had not been filed.

The answer lies on the surface; in this case there is no sale contemplated, there is no memorandum of charges to file, the Rule of Court ordered no sale in the first instance, but a division in kind; and a division in kind not only is not a sale, but is exclusive of the essentials of a contract of sale.

When a sale by licitation takes place before the Master, a stranger may come in and buy, and in that case, the rights and liabilities of vendors and purchasers immediately arise. In a division in kind, no such rights or liabilities arise, but the operation of art. 883 is, at once, brought into play; each heir or coproprietor is held to have always been the proprietor of the share that falls to his lot. Section 217 which specially deals with sales, never implied partitions in kind, which, so far as the proceedings commenced before the Ordinance are concerned, are protected by section 216, and "shall be continued under and subject to the law in force at the time when the same were commenced."

Here, not only had the proceedings already commenced, but they were completed so far as the first stage goes. The Rule of Court had finally ordered that the estates should be divided "en nature," if practicable. The Appraiser's report, as yet unchallenged, is to the effect that the division is practicable. It was again urged that by the law then in force, the appraiser's report must be homologated, and that this cannot, now, be done. Why cannot this, now, be done? Sect. 228 expressly repeals arts. 969 to 975 Code Civil Proced; but it does not repeal art. 982 Code Civil Proced., and that article speaks of the Judgment of homologation, and of the mode of settling and drawing lots. But if all the articles had been repealed, the proceedings for the division "en nature" having commenced before the passing of the Ordinance, they would stand repealed under Sect. 216, for future

cases; not for a case like the one before us. Let us go, even, farther; let us suppose that the formality of homologation had been repealed in such a way that the old law were no longer applicable, the result would be that the appraiser's report would stand without the necessity of a confirmation by the Court or Judge, as the case may be. When a legal formality required for the validity of a covenant is repealed, or its execution becomes impossible, and yet the covenant is not abrogated, the sole consequence is that whilst previously the covenant would not have been binding without the formality, it becomes binding without the formality. The same is true as to any judicial act or act done under a judicial order. The homologation of an appraiser's report gives it greater solemnity and greater authority; but if the law revoked the necessity of homologation the report would not lose any portion of its intrinsic value.

But the necessity of homologation, and its corollaries, have not been repealed. Where then is the practical difficulty? If the appraiser's report is wrong, this may be shown upon motion or application made for homologation, or motion or application made to have it set aside.

If it is confirmed, then the division in kind will easily take place; if it is not confirmed, then, and only then, may arise the necessity to sell by licitation, in execution of the secondary order found in the aforesaid Rule of Court.

Then, and only then, will arise the fact that there is to be a sale, and then will apply the provisions of the new Ordinance.

In this way, a Judgment of the Court, final so far as it goes, will receive its due execution, and parties will not be compelled to give up rights which possibly may prove abortive, but which, *prima facie*, are of practical application, since the report of the appraiser is still unchallenged.

We have come to the conclusion that the proceedings in licitation of the real Estate in question are, to say the least of it, premature. That Bétuel had no right to ignore the Rule of Court given not in his interest only, but in the interest of all the parties to it.

We are of opinion that Sect. 217 of Ord. 19 of 1868, specially treating of sales, cannot be made to extend to divisions "en nature." We are, further, of opinion, that the proceedings for the divisions "en nature" of the Estates in question commenced before the passing of the Ordinance, must be continued in terms of the general Section 216, according to the law then in force. We must reverse the Master's Order; annul the proceedings taken by Bétuel for the sale by licitation of the real Estates Rouessart, and order that Bétuel do pay the costs of this appeal and the cost before the Master, except such cost as have been incurred by those of the Respondents who took the same side as Bétuel.

Those Respondents will pay their own costs. Those other Respondents who were made parties to the proceedings, but took no active part, will have their costs, such as they may be, against Bétuel, the failing party.

SUPREME COURT.

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VENTE D'IMMEUBLES,—OFFRES RÉELLES,—CONSIGNATION,—INTÉRÊTS,—FRAIS.

Circonstances en vertu des quelles la Cour a décidé que l'acquéreur d'un immeuble avait eu juste sujet de craindre d'être troublé et avait agi conformément au vœu de la loi en faisant des offres réelles et en consignant son prix, et que le créancier condamné à perdre les intérêts qui auraient couru sans le fait de la consignation, devait payer les frais et les réclamer de l'auteur du trouble.

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SALE OF IMMOVEABLE PROPERTY,—REAL TENDERS,—DEPOSIT,—"CONSIGNATION,"—INTERESTS,—COSTS.

Circumstances in consequence whereof the Court has found that the purchaser of an immoveable property had just ground to fear being disturbed and had acted in accordance with the law in refusing to pay his purchase price and in making real tenders which were followed up by a deposit of such price, and that the creditor who had refused to comply with the conditions of the real tender made to him and who had lost, thereby, the interests which would have become due pending the time such money was deposited, ought to pay the costs and to claim the same from the party who caused the trouble.

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VINCENT GEORGES AND ANOR.,—Appellants,

versus

THE ORIENTAL BANK CORPORATION AND ORS.,—Respondents.

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Before:

His Honor SIR C. F. SHAND, Chief Judge and His Honor JUSTICE COLIN.

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P. L. CHASTELLIER,—Of Counsel for Appellants.
J. H. SLADE, —Appellants' Attorney.
HON. H. KŒNIG, —Of Counsel for Respondents.
E. DUVIVIER, —Respondents' Attorney.

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30*th September* 1869.

In this case, the Court had already, on the 4th of December 1868, given Judgment on the merits, and recalled an Order of the Master, under date the 6th October 1868, appealed against by Vincent Georges. By the aforesaid Judgment, it had been considered that the Appellants do pay to the Respondents the sum claimed from them by the Respondants, with interest thereon up to the day of their tender before the Master, the said Respondents giving security for the repayment of the said principal and interest in case of eviction or in case they are compelled to pay their

purchase price or any part thereof to the heirs Lepoigneur, and in the event of the Respondents declining to accept the said payment upon the said terms, it is ordered that the said Appellants, do, forthwith, after such refusal, pay the said principal sum and interest as above into the hands of the Registrar of the Court.

The Court, then,reserved all questions of costs and the question whether interest was due since the tender by Appellants, of the money before the Master, till the result of the question arising out of the claim made by the heirs Lepoigneur and affecting the immoveable property in question.

That question, which was an important one, has since been raised by the heirs Lepoigneur,and adjudicated upon by the Court ; we held that the rights of the Oriental Bank and Mercantile Bank were preferable to those of the heirs Lepoigneur, and we entered fully into the reasons which led us to that Judgment.

We have, now, been asked to consider the points reserved on the 4th December last, that is the question of costs and of interest, after tender by the Appellants, of their purchase price.

We have no doubt that the Appellants are entitled to their costs; they had bought, were ready to pay, offered to pay, but being directly threatened with eviction on the part of parties who set up claims of the value of which they were not called upon to judge and could not judge, they acted in strict conformity with the enactment of the Code: (Art. 1653) " Si l'achèteur est troublé, ou a juste sujet de craindre d'être troublé par une action soit hypothécaire, soit en revendication, il peut suspendre le paiement du prix, jusqu'à ce que le vendeur ait fait cesser le trouble, si mieux n'aime celui-ci donner caution, ou à moins qu'il n'ait été stipulé que, nonobstant le trouble, l'acheteur paiera,"—and offered to pay, provided they received security.

That was their right, a just right ; for, if having purchased, they were bound to pay as soon as called upon, they were entitled to have a clear title, and by law it is the vendor's duty, or the duty of those who claim the purchase price, as creditors of the vendor, to give a title and cause the " trouble " to cease, and to dispel the danger of eviction.

The Banks refused to give security, and a certificate of " Folle Enchère " was applied for as against the Appellants, ready as they were, not in words, but in fact and deed, to pay under security, or to deposit. Now, no costs would have been incurred before the Master; no appeal lodged, no costs before this Court, if that had been accepted which we hold ought to have been cepted in terms of Art. 1653 of the Code.

We are of opinion, therefore, that the Banks ought to pay the costs of the Appellants.

The interest after tender has not been insisted upon as to the Appellants, and rightly so, since, as soon as they deposited this money, it might have been taken out on security being given, and, clearly, the Appellants have not had the user or enjoyment of the same. But the Banks have urged that the costs and interest and percentage due to the Treasury, should be borne by the Heirs Lepoigneur whose claim caused the trouble complained of, and who have failed to sustain their claim.

The heirs Lepoigneur have failed to sustain their claim, and they have been mulcted in all the costs of the suit on the issue of which depended the fate of their claim.

But that principal claim, and its fate must not be confounded with the quasi-episode with which we have to deal. Here, the question was: were the Appellants Vincent Georges, who were threatened with eviction, entitled to pay under security, or deposit, as they offered ? We held that they were, and that no certificate for " Folle Enchère," should issue against them.

Those tenders which we sustained were not objected to by the heirs Lepoigneur; they were objected to by the Banks who applied for the certificate of " Folle Enchère."

Right on the principal issue as against the heirs Lepoignenr, the Banks, we are of opinion, were wrong on the collateral issue as against the purchasers Vincent Georges; the heirs Lepoigneur have to pay the costs of the principal issue; the Banks have to pay the Appellants' costs as to the collateral issue.

We do not think the heirs Lepoigneur should receive costs ; the mischief was caused by them after all ; it was they who set in motion pretentions found invalid and which created the disturbance of which the Appellants justly complained.

For the same reason, we think the Bank entitled to recover interest from the heirs Lepoigneur,and whatever percentage the Registrar will deduct from the sum deposited. Who caused the deposit and led to the loss of interest on the money deposited ? the heirs Lepoigneur. Who again gave rise through the deposit, to the Treasury claim of percentage ? the heirs Lepoigneur.

If the Bank were wrong to resist the Appellants' offer to pay, under security, or to deposit, surely the heirs Lepoigneur were wrong to create,through an illegal claim, the necessity of a deposit or of payment under security.

As to the two inscriptions which are stated to have been taken on behalf of the heirs Lepoigneur to wit : the minor Lepoigneur, and Isabella Lepoigneur, on the Estate bought by the Appellants, they are valueless after the Judgment of the Court in favor of the preference due to the claim of the Banks over the claims of the heirs Lepoigneur,even upon the hypothesis,of which we say nothing, that they might stand as against the Estate previous to such Judgment. Mr PELLERAU has very properly, to save further expense, not objected to their being erased.

Our Judgment is, accordingly, that the costs of this appeal, and the costs before the Master be paid to the Appellants by the Banks.

That all the interest due since the tender of payment made before the Master by the Appellants, of their purchase money, be paid by the heirs Lepoigneur.

That the Banks do recover back against the heirs Lepoigneur whatever amount may be deducted from the sum of money deposited on account of percentage accrueing to the Colonial Treasury upon the deposit.

That the inscriptions taken in Vol: 164, No. 40, at the date of 22nd June 1867, and inscription taken in Vol: 154, No. 42, at the date of 22nd June 1867, the first on behalf of Charles Victor Lepoigneur, under the guardianship of Pierre Ivanoff Lepoigneur, the other on behalf of Isabella Lepoigneur, be erased so far as they touch the property situate in Port Louis, at the corner of chaussée and Malartic streets, sold judicially and awarded to the Appellants Vincent Georges fils and Joseph Vincent Georges.

SUPREME COURT.

HABEAS CORPUS.—MANDAT D'ARRÊT.

Lorsqu'un mandat d'arrêt adressé aux autorités de l'Ile Maurice par une autre colonie anglaise, porte que le prévenu est accusé d'avoir commis "le crime de désertion et de détournement de fonds," un Juge de la Cour Suprême peut autoriser l'exécution du dit mandat d'arrêt à Maurice.

HABEAS CORPUS,—WARRANT OF ARREST.

When a warrant of arrest forwarded to Mauritius from another British Colony, charged the person against whom it was issued with having committed "the crime of desertion and embezzlement," the Court ruled that it was lawful for one of the Judges of the Supreme Court to endorse such warrant for the purpose of authorizing the apprehension of the party charged.

EX PARTE: C. L. SIEBUR.

Before:

His Honor SIR C. F. SHAND, Chief Judge and His Honor JUSTICE BESTEL.

E. J. LECLÉZIO,—Substitute Procureur and Advocate General appearing for the "Ministère Public."
W. NEWTON, —Of Counsel for the Applicant.
J. H. ACKROYD,—Attorney for same.

6th October 1869.

On an *ex-parte* motion to that effect by W. NEWTON on behalf of one Charles Léopold Seebur, a writ of *Habeas Corpus* was directed to JOHN TERENCE NICOLLS O'BRIEN, Chief Inspector of Police at Mauritius, ordering him to bring before the Court, the body of the said C. L. Seebur, then and now said to be illegally detained in the Central Police Station of Port Louis, in the said Island of Mauritius, together with the cause of the detention of the said C. L. Seebur.

The Court immediately ordered the writ to issue as moved for and made the same returnable on the following day the 29th day of September instant, when the consideration of the matter on motion of the Counsel of the said C. L. Seebur was adjourned to the 5th October instant.

The body of the said C. L. Seebur was produced with the return of the cause of detention.

The return put in shewed on its face a *prima facie* sufficient cause of detention of the said Seebur, viz. a regular formal warrant for the apprehension of the prisoner in the Cape Colony, backed by the signature of one of the Judges of the Supreme Court of Mauritius.

On Mr. NEWTON, attention being called to that fact, he contended that the indorsement of the warrant produced was illegal, null and void and rested his argument on Section 10th of the Stat. 6 & 7, Vict. C. 34, which he alleged, in no wise warranted the indorsation, by the Judge, of the warrant put in.

That the language of the act was as clear and precise as it was express: "It shall not be lawful (says the statute)" for any person to endorse his name upon any such warrant, for the purpose of authorizing the apprehension of any person under this act, unless it shall appear *upon the face of the said warrant* that the offence which the person for whose apprehension the said warrant has been issued is charged to have committed is such that, if committed within that part of HER MAJESTY'S dominions where the warrant is so endorsed, it would have amounted, in law, to a treason or some felony."

When called upon to indorse a warrant of arrest forwarded to Mauritius, from another British Colony, the first duty of the Judge applied to for indorsing such warrant, is to ascertain that the offence charged and appearing *on the face* of the warrant is an offence which, by the law, of the place where the indorsation is applied for, a Felony or Crime. If no Felony or Crime *appear on the face* of such warrant, the Mauritius Judge has no authority for granting the indorsation asked at his hand.

That in this case, no Felony or Crime appears *on the face* of the warrant bearing the indorsation complained of.

The offence charged is embezzlement. Is it an embezzelement of the QUEEN'S monies or stores? If so, such an offence would be a crime by our Penal Code, and the indorsation by one of the Judges of the Colony would be good.

If it be the embezzlement of monies belonging neither to the QUEEN, nor to the Master or Su-

perior Officer of the party charged, the offence would be but a simple misdemeanor punishable by imprisonment and fine (Art. 333 Penal Code). The warrant leaves us quite in the dark as to the class of embezzlement referred to. And why should we add to the embezzlement appearing on the face of the warrant, the necessary requisites to convert a simple embezzlement, a mere misdemeanor, into one of a more heinous nature, or into a crime?

In answer,the SUBR. PROCUREUR GENERAL *supported the indorsation now quarrelled,and argued that the several documents forwarded with the warrant having been laid before the Judge who indorsed the warrant, should be read in connection with the warrant inasmuch as they afforded the Judge an opportunity of ascertaining the real nature and gravity of the offence summarily stated in the warrant. But on reference to the documents referred to the Judge had collected that the embezzlement charged on the face of the warrant being the alleged embezzlement of Public monies was such as a conviction in this Island would have warranted the Court of Assizes to award not the more lenient punishment of imprisonment and fine, but that penalty which our Penal Code attaches to the crime of embezzlement, viz: reclusion or hard labour.*

JUDGMENT.

The wording of Section 10 of the statute referred to appears to us clearly to require that the warrant of apprehension coming to this Island from another British colony is not to be endorsed by any Judge, unless the offence charged appears on the face of the said warrant, to be a Felony or Crime within that part of HER MAJESTY'S dominions where the warrant is endorsed, that is to say,in the present case, in the Island of Mauritius.

Now, what is the offence which appears on the face of the warrant produced? The said C. L. Seebur is expressly charged with having committed "the crime of desertion and embezzlement."

Have we a law, here, which punishes as a crime or felony the crime or embezzlement? undoubtedly we have. If so the charge is that of a crime known to our law, but whether the embezzlement were to the prejudice of HER MAJESTY or of a public Department or otherwise, will be matter for subsequent consideration on the trial of the party charged.

The only point we have to ascertain is whether there is, in the offence appearing on the face of the warrant laid before us, sufficient to authorise the Juge to grant the indorsation complained of. We think, looking at the face of the warrant and not going beyond it, that there is.

We are, therefore, not in the position to authorise the liberation of the prisoner, but must order him to be remanded, and he is hereby remanded, accordingly.

SUPREME COURT.

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CAUTION,—SUBROGATION,—NOVATION.

Le Ceylon Company ayant garanti le paiement de trois annuités d'une créance hypothécaire, moyennant subrogation, et la propriété hypothéquée ayant été vendue ensuite par voie d'expropriation avant l'échéance de la troisième annuité (les deux premières étant payées) et achetée par le porteur de la créance hypothécaire pour un prix inférieur à sa créance, la Cour a décidé que le Ceylon Company était obligé au paiement du montant de cette troisième annuité bien que par le fait de l'expropriation du débiteur principal, la dite créance hypothécaire était devenue exigible en totalité et non par annuités.

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CAUTIONER,—SUBROGATION,—NOVATION.

Where the Ceylon Company had bound itself to pay with subrogation three instalments of annuities of a mortgaged claim, and afterwards the mortgaged property was sold by way of forcible Ejectment before the third annuity had become due (the two first one having been paid) and purchased by the mortgage creditor for a price below the amount of the claim remaining due to him, the Court held that the Ceylon Company was bound to pay such third annuity, although by the fact of the sale by forcible Ejectment of the mortgaged property such mortgage claim had become due for its whole amount and no more by annuities.

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MAURITIUS LAND CREDIT COMPANY LIMITED,—Plaintiff,

versus

CEYLON COMPANY LIMITED, — Defendant.

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Before:

His Honor the CHIEF JUDGE and
The Honorable JUSTICE COLIN.

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THE HON. H. KŒNIG,—Of Counsel for Plaintiff.
V. BOULLÉ, —Attorney for same.
E. J. LECLÉZIO, —Of Counsel for Defendant.
R. DUVIVIER, —Attorney for same.

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10th September 1869.

This was an action brought by the Plaintiffs against *The Ceylon Company*, to recover the sum of £6,165.50 for the amount of an annuity for the year 1868, due upon a loan made on July 20th 1864, by the Plaintiffs to Miss Augustine

Marie Lise Sévène, then owner of the *Belle Etoile* Estate, situate in the district of Flacq, which aforesaid annuity *The Ceylon Company* had undertaken to pay under the circumstances that shall be presently set forth. The annuity of which payment was sought to be enforced by the present action, fell due in two equal instalments of $3,082,75 each, on February 1st and August 1st 1868, and as it was not paid when it ought to have been paid, according to the Plaintiff's contention, interest also was claimed, but only from the day of service of the Declaration. The undertaking of the Defendants took place under the following circumstances:

As already stated, Miss Sévène borrowed from the Plaintiffs a certain sum of money, to wit: $55,000, to be repaid by her in twenty one yearly payments or annuities of the sum of $6,165.50 each, each annuity being itself payable in two instalments, respectively due 1st February and 1st August of every year, until total extinction of the debt. To secure this claim, an hypothec was inscribed on the *Belle Etoile* Estate. It appears that the *Belle Etoile* Estate, was, on April 3rd 1866, in virtue of a special power of attorney given to *The Ceylon Company*, by Miss évène, sold by *The Ceylon Company* to Laure Bussy de St. Romain. One of the conditions of sale was, that the purchaser should pay the amount due to the Plaintiffs. The consent of the Plaintiffs to the intended sale was solicited and given in a letter dated November 11th 1865, under the following condition "that *The Ceylon Company* shall take directly towards *The Mauritius Land Credit and Agency Company Limited*, the obligation not only to pay, during three consecutive years to reckon from 1st February 1866 and at the stipulated time of payment, the instalments of annuities due by Miss Sévène, but also to give the aforesaid Sugar Estate *Belle Etoile*, such effective assistance as will ensure to the Plaintiffs the preservation of their pledge and their hypothecary rights. *The Ceylon Company* then directly came into the field, and in a letter dated April 3rd 1866, signed by Mr Arbuthnot the Manager of the Company" informed the Plaintiffs that " under an opening of credit, dated this day, for the Estate *Belle Etoile* in the district of Flacq, lately the property of Miss Sévène. *The Ceylon Company Limited*, have undertaken to pay, during the years 1866, 1867, 1868, the annuities payable to your Company on account of the loan made by your Company to Miss Sévène, and which is secured by privileged hypothecation on the said Estate. The said payment will be made with subrogation in favour of *The Ceylon Company Limited*.

The Plaintiffs, on April 9th 1866, admitted that the over-due instalment had been paid to them, and repeated their acceptance of the undertaking by *The Ceylon Company* to pay the annuities for 1866, 1867, 1868, the whole without innovation or derogation from the Plaintiff's rights promising also to subrogate *The Ceylon Company* at each payment, but expressly reserving priority for the balance that might remain due to them, the Plaintiffs. The above conditions were also inserted in the contract between *The Ceylon Company* and Laure de St-Romain. We read there that the Company reserves to itself, the right of reducing the amount of credit allowed to St. Romain, but, " dans l'un et l'autre cas, la Compagnie prend charge de payer pendant les dites trois années 1866, 1867, 1868, les annuités qui seront dues au *Mauritius Land Credit and Agency Company, Limited*, en se faisant subroger aux droits de la Compagnie du *Crédit Foncier*.

That is the contract to which Mr. Arbuthnot referred the Plaintiffs in his letter dated April 3rd 1866.

It further appears that the aforesaid covenant was duly executed in 1866 and 1867, but the Defendants, although requested, have not paid the amount of the third year's annuity, which the Plaintiffs allege was due before the commencement of this suit.

Upon those facts, the action was brought for the amount above stated.

The Defendants did not plead within the legal delay, and a rule was taken out of the Registry calling upon them to show cause why Judgment should not be signed against them for want of a Plea.

On its return, the Rule was enlarged, and ultimately, on the 3rd of November 1868, the Defendants obtained, by consent, leave to file their Plea within eight days.

The Plea denied all the facts set forth in the Declaration. It, then, (2) set forth that the Plaintiffs had no right of action against the Defendants. (3) That the Defendants did not bind themselves in manner and form as alleged, nor are they now bound in any manner whatever. That they, the Defendants, are not indebted in manner and form and in the amount alleged, nor in any way or to any amount whatsoever. (5) That at the time when the alleged half of the alleged annuity of the third year mentioned in the Declaration, *i. e.* 1868, purports to have become due, *i.e.* on 1st February 1868, the considerations of the contract between Plaintiffs and Defendants had, altogether, changed, and could no longer be executed in all their contents. (6) That the Estate *Belle Etoile* had been since August 27th 1867, seized at the request of a creditor, whereby the whole of the Plaintiffs' claim upon the said Estate has become exigible *plano jure* and could no longer be either claimed or paid by half annuities, and that the Plaintiffs could, no longer, subrogate the Defendants in all their rights in and upon the said Estate, as they were bound to do. (7) That the Plaintiffs did on or about November 28th 1867, purchase the said Estate *Belle Etoile*, upon the sale by forcible ejectment which was then prosecuted for a price far below the amount of their claim. (8) That being first inscribed creditors upon the said Estate, the said Plaintiffs have, virtually, paid themselves part of their loan aforesaid, and absorbed the whole sale price of the said Estate, and that they the Plaintiffs could, no longer, subrogate the Defendants in their rights in and upon the said Estate, as they were bound to do.

In their Replication, the Plaintiffs, practically joined issue, and maintained that they were still able to subrogate the Defendants in all their

rights but reserving priority to themselves for the balance of their claims, as agreed upon.

We are of opinion that the pleas put in by the Defendants, in so far as they deny all and several the facts set forth by the Plaintiffs are altogether untenable. Whatever may be the legal bearing of the other pleas, the facts alleged by the Plaintiffs, we find to be true. It is shown by the strongest evidence, that the Plaintiffs were creditors, as they allege to be, and that they consented that the sale of the Estate *Belle Etoile*, from their original debtor to Laure de St Romain, should take place through *The Ceylon Company*, on condition that *The Ceylon Company* should undertake to pay three of the annuities that were to become due, *i.e.* the annuities for the years 1866, 1867, 1868. It is distinctly shown that this was agreed to; it is, moreover, shown that the covenant received its execution in 1866 and 1867.

We have before us a clear undertaking, not a promise to pay depending upon certain contingencies, not even a warranty of payment. The contract is a direct one, neither collateral nor conditional.

This is so much so, that in the contract settling the conditions of advances to be made by *The Ceylon Company* to St Romain, whilst the Company reserves to itself the right of reducing the amount of the sum it bound itself to advance, it undertakes, in either case, to pay to the Plaintiffs the annuities for the years 1866, 1867, 1868.

The contract is a very special one; a good many annuities are still to become due; the Defendants do not undertake to pay the amount of any three of them out of the whole; they specially undertake to pay the three due for 1866, 1867, 1868.

The Defendants, now, decline to pay the last annuity; and the reason alleged is, practically, that the Plaintiffs can no longer execute their part of the covenant. The several pleas last pleaded, merely reiterate that defence, and the part of their covenant which, it is alleged, the Plaintiffs can no longer execute is that they cannot subrogate the Defendants in their rights.

It is doubtful whether the subrogation, here, was intended to have the force of a resolutory condition. Subrogation is granted by the law (Art. 1251) to any creditor who is preferable to himself, on account of his rights, privileges and hypothecs, and as Art. (1252) affirms the maxim, *nemo contrà se subrogasse censetur*, the promise to subrogate, with priority and preference reserved, amounts, in this case, to exactly that which the law would have effected on behalf of one creditor paying a preferable creditor, and on behalf of the preferable creditor for the balance remaining due.

But it is unnecessary to consider that question, because we find sufficient evidence to lead us to what seems to us a very clear conclusion even upon the assumption that the condition of subrogation was intended to have resolutory force.

From the facts before us, we are of opinion that the subrogation was possible on the 1st February 1868; is possible now; and if it were no longer possible, the Plaintiffs are in no wise to blame for an altered state of things, which if, imputable to either of the parties before the Court, is imputable to the Defendants more than to the Plaintiffs.

The Estate *Belle Etoile* has been seized and sold. By the Plaintiffs' laches or fault? In no wise. Nay, the Defendants were warned by Mr. Currie one of the Plaintiffs' Board of Directors of what was taking place, and the answer received from the Manager of *The Ceylon Company Limited*, under date September 23rd 1867, runs as follows; "Referring to this matter of *Belle Etoile*, I wish to say that as I do not see now, my interference, can, in any way, benefit this Company, I have determined to let Mr Jollivet do as he pleases, should the Estate come to be sold, it might be that an arrangement as to the purchaser might be prudent; but meanwhile, as I have said, so far as I am concerned, things may take their course."

Now, the Plaintiffs had required that their hypothecary rights should be secured by the Defendants giving for three years effective assistance to the Estate. In this letter of 3rd April 1866, Mr Arbuthnot makes no mention of this, but refers the Plaintiffs to his contract with Laure de St-Romain, dated same day, and in that contract, *The Ceylon Company* bound themselves to advance large sums of money to St-Romain for three consecutive years.

But if things were to take their course, and it appears they did, the last year's (1868) advances would not be made to St-Romain who was ejected in November 1867, and the Plaintiffs' hypothecary rights would be, and it appears they have been, greatly prejudiced, possibly through no fault of the Defendants, but surely no fault or even slight negligence can be imputed to the Plaintiffs, themselves, who seem to have always strictly adhered to their contract.

But, legally, how does all this change the position of parties, or take away an atom of force from the direct undertaking to pay assumed by the Defendants?

They say, however, the Plaintiffs are bound to subrogate, and they cannot, now, subrogate.

Why cannot they now subrogate? The claim is not extinct; it is in full legal force. It may be practically, of no great value, as the Plaintiffs' balance may practically be of no great value; but it exists nevertheless. If it is true that the Plaintiffs have bought the Estate, they owe the sale price; that sale price, as usual, must go to the highest privileged creditors; but be those highest privileged creditors who they may, the claim against the debtor or debtors for any balance, is still there, may be sued for and recovered, and *The Ceylon Company*, for their balance, is in no worse legal position than the Plaintiffs for their balance, except that whether this turns out to be of practical value or not, the agreement has given, as the law gives, priority to the Plaintiffs.

There is not even before us evidence that St.-Romain is hopelessly insolvent, he has been ejected; that is a fact and strong presumption that his affairs are not prosperous; but of his other assets or possible means of meeting his liabilities, we have no data on which to form a judicial opinion.

But if he were hopelessly insolvent, the market value of the claim for which *The Ceylon Company* has twice received and would now receive subrogation, may be greatly lowered; but the claim is still the claim it was, so far as its legal position goes. Its nature is not altered, though its importance may be altered; at each stipulated period of time, *The Ceylon Company* may, for the annuities it has paid, as the Plaintiffs may, for the annuities still due to them, recover by Judgment against the debtor or debtors, and have such execution as the law permits.

Even if the claim had disappeared, it has not disappeared by the fault of the Plaintiffs. Taking into consideration the contract with St. Romain (3rd April 1866) specially referred to by Mr. Arbuthnot in his letter to the Plaintiffs, the Plaintiffs' conditions to give their consent, we are of opinion that if either party has to complain, the Plaintiffs have to complain that the Estate was not worked for 3 years. It may not, we repeat, be the Defendants' fault, at all, if some untoward circumstance interfered with the execution of that contract, but it assuredly is not the Plaintiffs' fault. They have done nothing, and the facts disclose to us nothing to show that the direct covenant to pay, specially the 3 annuities for 1866, 1867, 1868, has been at all modified. Neither in any case have the Plaintiffs guaranteed the value of their claim, they would hardly have done this, when they sought and obtained another debtor, besides the original obligee, for a portion of such claim.

When the Defendants bound themselves directly, they knew that if the Estate came to be sold for less than the amount of the hypothecs inscribed upon it, all such hypothecs that would not be covered by the sale price, would, by the Judgment whereby the sale price is distributed, be ordered to be erased; and yet they did not object to yield priority and preference to the Plaintiffs; now they admit by the plea that the Plaintiffs, themselves, will not receive the whole of their claim; what right have they to complain as against the Plaintiffs, if their own share of the debt which is postponed to the Plaintiffs' share, is not paid?

At all events, we have no evidence before us that at the time the Defendants had bound themselves to pay, and they ought to have paid the annuity in question, a final "Ordre" or Judgment had swept away the hypothecs not carried by the sale-price; we have no evidence to shew, that at that time, even that confessedly valueless accessory of the debt had ceased to exist. And it is clear law that any fact which happens after a subrogation will not create a warranty not expressly agreed upon. The same rule holds good, if the subrogation does not take place, because the party that should receive subrogation on paying, declines or postpones payment. (LAVALLEE. DALLOZ 49. 1. 40.)

We say nothing of a case in which the who has to receive payment and give subr would be guilty of laches or negligence. T does not arise in the suit before the Cou sides, Art. 2037 applies to cautionary obli not to direct ones, and even if this could sidered as a cautionary obligation, ther be "le fait du créancier"; and again t tioner would only be discharged to the e the prejudice suffered through non subr POTHIER, *obligations*, No. 557; also S. V 118, TROPLONG, *caution*, No. 572.

We should also take notice of an ar raised by one of the Pleas. It was urg on account of the sale of the Estate, the claim of the Plaintiffs had become due an no longer be paid by annuities. Suppose be correct, now does this change the Defe undertaking to pay a specific sum? It w a strange theory that if A owes a debt w is allowed to pay by instalments, and B takes directly and personally to pay the of one of the instalments, that B's obl should be avoided, because, by some conti A loses the benefit of paying by instalmen

This does not touch B's special liability by some condition in his contract, or sub stipulation, the creditor's right has bee jected as to B's liability to him, to som contingency. There is nothing of the k the cause before us.

Upon the facts laid before the Court, v that the Plaintiffs have made out their cas no negligence, is brought home to them find that even supposing that the obligat subrogate carries such force that if it cann place the contract must be cancelled, the tiffs may, as they offer, subrogate, now find that the debt, whatever may be its still exists. We find no express or lega ranty undertaken by or binding upon the tiffs, and therefore must give Judgment fo with costs.

SUPREME COURT.

CONTRATS ET OBLIGATIONS,—MISE EN DE —DOMMAGES,—ACTION RECONVENTION

Circonstances d'après lesquelles la Cour a que l'entrepreneur qui, à la suite d'un acco tait engagé à livrer son travail à une époq taine, n'était en demeure qu'à dater d'un mation qui lui avait été faite postérieure l'époque convenue.

L'Employeur qui refuse de payer le travail a vrier sur le motif que par la faute de celu travail lui a occasionné des dommages, peu ver ces dommages dans le cours de l'act paiement qui lui est intentée par l'ouvrier, pas obligé à cet effet de lui intenter une reconventionnelle.

WORK AND LABOUR DONE, — CONTRACT OBLIGATIONS,— "MISE EN DEMEURE," MAGES,—CROSS-ACTION.

Circumstances under which the Court ruled that the workman who, conformably to an agreement, has bound himself to have his work completed on a fixed day, was not "in mora" until he had received a "mise en demeure" which had been served upon him after the date agreed upon.

The employer who refuses to pay the price agreed upon to a workman, on the ground that by the fault of the latter he has suffered damages, may prove such damages as a defence to an action in payment of the workman's salary; he is not bound to enter against him a cross-action to that effect.

—

POCULOT,—Plaintiff,

versus

MAROUSSEM,—Defendant.

—

Before:

His Honor Sir C. F. SHAND, Chief Judge and His Honor JUSTICE COLIN.

—

P. L. CHASTELLIER,—Of Counsel for Plaintiff.
A. J. COLIN,— Plaintiff's Attorney.
Hon. V. NAZ,— Of Counsel for Defendant.
W. HEWETSON,— Attorney for same.

—

1869.

In this action the Plaintiff Poculot, an Engineer in Port Louis, sued the Defendant Maroussem, the proprietor of the Estate *Antoinette* in the District of Pamplemousses, for work done and materials provided for the said Estate, from 28th November 1866 to 21st August 1867, or thereabouts. The Plaintiff concluded for the sum of $2,326.15c. as the balance of an amount of $2,696 for said work and furnishings, credit being given for $300 paid to account.

The Defendant pleaded not indebted, "and "farther that under an agreement made with the "said Plaintiff, on the first day of July in the "year one thousand eight hundred and sixty "seven the said Defendant undertook to perform and deliver on or before the thirty first "day of July in the year one thousand eight "hundred and sixty seven, in complete and satisfactory working order, certain works specified in the said agreement, namely 1o. Putting "up a complete set of vacum pan. 2o Furnishing iron waggon for sugar. 3o. Putting up "the engine for turbines and various other works "more fully specified in the said agreement to "to which reference is made."

"That the said Defendant did not perform "the said work and did not deliver the same in "working and satisfactory order at the time "specified or at any other time, and did not perform and execute the conditions of the said "agreement, to the Defendant's damage and prejudice of upwards of eight hundred pounds "sterling."

The Plaintiff joined issue on the first plea, and as to the other he said "that the work which he "agreed to make on the Defendant's Estate was "duly made and delivered, and the said delivery "duly accepted by the Defendant who has used "the machinery put up by the Plaintiff on his "Estate *Antoinette*, and still uses the same."

"And the Plaintiff further says that he has "truly executed the conditions of his said agreement."

From the evidence in the case, it appeared that by a "sous seing privé" dated 1st July 1867, a contract had been entered into between the parties, in the following terms:

"Entre Monsieur Jules Poculot, Mécanicien, "demeurant au Port Louis, d'une part; Et "Monsieur Albert Ferran agissant pour Monsieur "Arséne Maroussem, Propriétaire, d'autre part;"

"Il a été arrêté et convenu ce qui suit, savoir:

"1o. Que Mr. Jules Poculot s'engage à lui "monter une installation compléte de vides, c'est à "dire installer tous les bacs à clairces, à sirop etc. "etc., fonctionnant parfaitement par le moyen "de tuyautages et robinets de charges et de décharges, et, en un mot, tous les accessoires né"cessaires pour faciliter, le plus possible, le travail de cette installation, pour prix et somme "de mille piastres."

"2o. A lui fournir un charriot en fer, complet, "et devant contenir une cuite des vides, pour "prix et somme (voir le devis entre ses mains.)"

"3o. A monter le moteur des turbines avec "tuyautage nécessaire pour prendre, à l'occasion, "une prise de vapeur des deux autres grands "générateurs; installer le mouvement des tur"bines; fournir une pompe d'alimentation don"nant plus d'eau qu'il n'en faudra au multitu"bulaire; adapter un tuyautage à cette chau"dière, pour faire fonctionner les turbines, et "faire une réparation au dit multitubulaire; pla"cer la pompe servant aujourd'hui à l'alimenta"tion de ce générateur, au mouvement des tur"bines pour extraire l'eau de ses fonds: monter "le diviseur; placer une pompe attendue pour "le puits de Dufay; le tout pour prix et somme "de deux cent soixante piastres."

"4o. Tous ces travaux généralement quel"conques, seront livrés positivement le 31 Juil"let 1867, et ne seront payés que 60 jours "après leur mise en marche, et fonctionnant, "alors, à l'entière satisfaction du dit propri"étaire qui se réserve aussi le droit de faire "venir un autre mécanicien, si toutefois Mon"sieur Jules Poculot ne se rendait pas sur l'E"tablissement quand sa présence sera requise "par une simple lettre écrite par l'administra"teur; et dans ce cas ce dernier déclare n'avoir "aucune réclamation à faire à M. Arsène Ma"roussem, même pour les travaux commencés."

"Fait double et de bonne foi, *Antoinette*, ce "1er. Juillet 1867."

"Approuvé le présent.

(Signé) A. FERRAN,
Pour A. MAROUSSEM.

Approuvé,
(Signé) J. POCULOT."

The trial of the case occupied a number of the sittings of the Court and many witnesses were examined on both sides.

P. L. CHASTELLIER for Plaintiff: I ask nothing but fair remuneration for my work and labor. My demand divides itself into two branches; the one for what I did under the contract, the other for labor and furnishings not embraced within the agreement. The latter amounts to about £1706 and it has been proved by the witnesses Bourdin & François, as not included in the written agreement, and the same witnesses, along with the witness Ferriol, state that the prices charged for them are reasonable. The Defendant admits some of them and disputes the rest; but I submit that we have established the whole of them. We were not bound to supply any materials, under the contract; our duty was only to put up the materials furnished to us.

The leading ground of defence is, shat the work was not completed by the Plaintiff. But the first crop of 200,000 lbs. was actually made with this machinery and the subsequent crops have been also made with it. This proves not only that the machinery was put up, but also that it was well done. Mr Poculot spared no expense to do this. He employed Mr Bourdin, a gentleman of great skill and experience, to superintend the operation. His testimony and that of our other witnesses Messen, Neptune and Chavrymootoo, is conclusive. The Defendant's witnesses, the Messrs. Hanning, admit that the work was well done and that if a little time had been allowed to rectify some trifling defects, no difficulty could have arisen between the parties.

It is said, on the other side, that the work was not finished within the time agreed upon. No doubt the contract was very stringent on this head; but the evidence shews that the Defendant waived the point of time and enlarged the period of operations. This was only reasonable when there was so much important and heavy work to execute. But, in truth, we could not get on with the work, as the materials were not supplied to us in proper time.

The Boiler did not arrive on the Estate till 18th of July, and it was only on the 2nd August that the necessary mason work was completed.

Hugh Hanning tells us that Ferran stated to him that the Defendant had enlarged the time for finishing the work, and this is established by the fact that during the month of August there were various written orders from the Estate to us asking us to send certain pieces of machinery &c., etc. See particularly Ferran's letter of 25th August.

The Defendant's " mise en demeure " of 2nd September shews that enlarged time had been given. We were then merely asked to deliver the work. Nothing was therein said as to the legal delay having expired. Suppose we had, within 48 hours, delivered the work as therein required, nothing could have been said. In fact it was really finished; only some details remained to be done.

If Bourdin had not been summarily dismissed, all would have been put to rights. He never had a fair opportunity to put things right.

Carbonel's case in 1863, is quite in contrast to the present. There the work was proved to be badly done; here it is just the reverse.

I admit there is a contradiction in the evidence as to the machinery having worked well and produced a *cuite* (batch) of sugar, particularly in what Ferran and Bourdin say. But the former is indirectly interested in the case, and tho' the latter has not yet been paid for his trouble, that cannot affect his testimony. Hugh Hanning, it is true, swears that there could have been no " cuite " in the sugar pans, and Ferran says the same, while Bourdin swears positively that there was. This latter is direct evidence, and it is to be noted that Hanning was on the spot only twice, viz: on 5th and 19th and on the latter occasion, only for a quarter of an hour. The other Hanning (Robert) was only there on the 6th, 2 days after the pans were tried. It is quite a mistake in the statement of some of the witnesses when they say that there was no " Jumelle " for the sugar waggon. As to the waggon, itself, (CHARIOT), we never got a fair opportunity to test the article, and this observation runs thro' the whole case and applies to the whole machinery. It is said that the skilled workman Messen was withdrawn by us from the work, prematurely, but by that time, in point of fact, things were really completed; only a few details remained to be done.

The claim of damages attempted to be set off against our demand is inadmissible. For, the losses alleged are merely indirect and consequential, which are never allowed. SELWYN, *Nisi Prius, in loco.* How could I be prepared to rebut such general claims of loss? All that was decided in *Carbonel's* case in 1863, was that the Defendant might have brought a suit in damages against me if he pleased; but he has not done this. Counsel farther referred to ZACHARIÆ, *mise en demeure*, p.547, note 3. TOULLIER, Vol. 6, No. 569.

HON. V. NAZ for Defendant. (Reads Declaration and Plea.) The positions which I maintain are these: 1o. The Plaintiff did not execute the work within the delay stipulated; in fact, he never completed it. 2o. It was not in time to prepare the crop for which the machinery was ordered, as the Plaintiff knew, all along. 3o. By this failure of the Plaintiff, damages, far above the amount claimed, were sustained on the authority of *Carbonel's* case, I can set off the damages I suffered in answer to a demand for payment of bad machinery. It was an express stipulation in the present case that the work should be completed by the 31st July (reads last clause of contract.) This is, in law, the most peremptory of clauses C. C. 1,139 and 1,146 to be read together. No *mise en demeure* was required. LAROMBIÉRE on *contracts*, ad art. 1,139, Nos. 7 and 8. The Civil Code, in opposition to the Roman Law, requires such a specific article fixing a definite time, as the mere elapse of the term is not enough. TOULLIER, vol. 6, No. 251. Mr Raffray's evidence clearly shews that the crop which

should have been begun in July, only commenced on 19th September and even in the middle of November; the Messrs. Hanning tell us that workmen were required to be kept on the Estate to keep the mill going, and owing to the defects in the machinery, the crop was not finished till March (See the evidence of L'Amour, Ferran and the two Hanning's.) A quantity of about 200,-000 lbs. of sugar was lost by the delay, equal on an average, to £5 a cwt. The witnesses Ferran, Lebon, Ferriol and Raffray, have spoken to this. The object of the Defendant was to unite the Estates of *Antoinette & Lucia* into one & to sell off the machinery on the latter Estates as the new usine would do all the work. He had sold the old machinery for $ 13.000 but as we could not deliver it, the contract had to be broken. The Plaintiff made the contract for us with the Engineers in England & he prepared all the plans etc. so if he forget any thing to make the work complete, he has himself to blame & must take the consequences. We were fully entitled to rely upon his zeal and skill in preparing & completing every thing. TROPLONG, *ouvrage*, 981 : yet, it is clear, the piping ordered was useless, and so were the leather straps. It cost us $ 1.000 to correct the blunders of the Plaintiff and set things to rights. The usine, if it had been in good order could have made lbs. 500.000 a month, as it was only 55.000 were made in the month of August. The result of the other months was equally unsatisfactory. It is true that on the other side, four of the Plaintiff's workmen have come forward & stated that the work was well done. These are Ferriol, Bourdin, Neptune and Messen. But their interest is to support the Plaintiff, for, they have not been paid for their work & have lodged attachments in our hands. Bourdin has committed the grossest mistakes, to say the least, in his evidence. He says Hanning was present when the machinery was at work & expressed his satisfaction with it. This is absolutely untrue. Again, the same witness state that a *cuite* of sugar had been made in the Pans, but this was physically impossible, as both the waggon (chariot) and the trough (jumelle) were wanting. If a *cuite* had been made distinct traces of it must have remained ; but the witnesses tell us there were no traces. In fact, the Plaintiff neglected the work. He sent Bourdin, but not till the 18th July. The dates, in the account sued on, speak for themselves. They begin on 16th July and don't finish till 30th Aug. If the work has been completed as the Plaintiff attemps to shew, what earthly motive could the Defendant have had to send a "mise en demeure" and not go on with his crop which was spoiling on the ground ? The effect of this " mise en demeure" ran from the date at which the work ought to have been finished, not from the date of the notice, itself. TOULLIER, vol : 5, No. 229. LAROMBIÈRE, ad art ; 1146,7, note 3. The only delay granted by us was the liberal one of a week, as we did not wish to stand upon the contract in all its rigour as to time.

There is a charge in the Plaintiff's account for what he calls extra furnishings beyond the contract. But though the sum is not very great, in principle such a demand is inadmissable. We employed the Plaintiff as a man of skill to order all the articles from England. If he omitted some articles, he has himself to blame. He bargained that for a net and fixed sum ; the whole work should be completed, and we cannot be called on to pay more, otherwise a planter would never be sure that he would get the machinery he wished for the sum which he stated and which he could afford. Besides, the Plaintiff capriciously altered the pullies that were sent out from home, which had to be restored by Hanning. He also fixed the pans so low that the "chariot" could not get under them, and a complete alteration thus came to be required which cost a considerable sum of money.

The Plaintiff was liable for "*faute légère.*" TROPLONG, *ouvrage* No. 981. As to the damages which he contended he was entitled to set off against the Plaintiff's demand, Counsel submitted that the loss caused by the Plaintiff's failure to finish at the time agreed upon, the expense of working two sugar houses instead of one, the impossibility to sell off the machinery upon the estate *Lucia*, which the Defendant had arranged to do, and the loss of crop, amounted to much more than the whole of the Plaintiff's demand.

JUDGMENT.

This is an action brought by an Engineer against the owner of a sugar estate, for work done and materials supplied for the benefit of the Defendant's property. The Plaintiff Mr. Poculot is an Engineer in the town of Port Louis, and the sum he demands from the Defendant Mr. Marroussem the proprietor of the Estate " *Antoinette* " in the District of Pamplemousses, is £2,396.15 the balance of an account of $2,696.15 the difference, viz : $ 300, having, as is stated, been paid to account.

The first date in the account relating to the matter now in dispute, is 16th July 1867 and the last 21st August of the same year. It has been shewn in evidence that on the 1st July 1867, the parties to the present action entered into an agreement, in the form of a private deed, whereby the Plaintiff undertook, *first* ; to set up a complete set of vacuum pans in the sugar-house of the Defendant's Estate at Pamplemousses, with all the accessories necessary for their complete and effective working, for the price of £1,000. *2ndly* : To furnish an iron waggon (chariot) for the sugar-house, sufficient to contain a batch (cuite) of sugar from the vacuum pan, for the price mentioned in a certain " devis " (estimate) but which appears to have been mislaid.

It may, here, be noted that in his account the Plaintiff asks, under this head, the sum of $ 430 as the price of the said waggon, but the Defendant has only admitted the amount of $ 250 which, he says, was the price actually agreed upon. We shall see in the sequel what proof has been adduced on this point.

3rdly To set up the machinery for moving the turbines, to place a large feeding pump for one of the Boilers & to execute various other pieces of work in the machinery of the Defendant's Sugar House, (the words of written contract referred to) for the price of $ 260.

4thly. In the last clause of the agreement, it was stipulated that the whole works should be delivered over, positively on the 30th July 1867.

It is upon this agreement that the Plaintiff founds the larger portion of his demand. But at the same time, he has stated in his account a variety of items amounting to $ 810.15, or thereby, which he says he is entitled to add to the sums due to him under the agreement, being, as he alleges, for certain work executed not covered, by the term of the written contract. All this, it must be remarked, is without reference to the first item in the account that of ℔ 21 under the date of 28th November 1866. This item has nothing to do with the present dispute, and the Defendant admits that it must be paid by him.

Such being the nature of the Plaintiff's demand, let us now see what is the defence relied upon by M. Maroussem.

The leading Pleas maintained by the Defendant, on Record, and in the course of the lengthened discussion which the case has undergone, may be resolved into these propositions:

1st That the Plaintiff failed to perform the contract within the time limited or within the extra time which was given to him *ex gracia* by the Defendant, & that, in point of fact, the Plaintiff never at any time delivered over the work complete, the Defendant being obliged to call in other Engineers to rectify the Plaintiffs blunders and to finish the operations necessary to put the machinery in efficient working order: that the direct and immediate cost of this failure on the part of the Plaintiff, was a charge by these other engineers, of about ℔ 1000 which the Defendant has paid to them, and that the whole loss and damage which he has sustained by the failure of the Plaintiff to complete the work in due time, amounts to ℔4000 and more than extinguishes the Plaintiff's whole demand. The Defendant has further contended that in any view, the extra charges of the Plaintiff or many of them, at least, would be inadmissible in law, as they are covered by the written contract and their value included under the price therein agreed upon.

We shall consider these pleas and some subordinate ones of less importance, in their order. And first as to the defence that the work was not completed at the time stipulated, or indeed at all, by the Plaintiff, what is the fact here ?

In the original " sous-seing privé " it was covenanted that " *tous ces travaux, généralement quelconques, sevont livrés positivement le* 31 *Juillet* 1867." It is admitted by the Defendant, (see Ferran's evidence) that a further term of one week was expressly granted in addition. This would bring the time finishing the work to the 8th of August.

Now, in proof that the work was not completed at that date, we have, among other circumstances which will be noticed by and by, the fact that the Defendant served upon the Plaintiff a *mise en demeure* long after that time, viz. on the 2nd September, calling upon him to complete the work, within 48 hours, and deliver the same in full working order, and in default thereof to pay all loss or damage accrueing from the non-execution of the agreement. On the service of this legal demand, the Plaintiff with his workmen left the Estate and neither he nor they ever returned. The work was completed by other Engineers called in by the Defendant, viz: the Messrs. Hanning.

It is said, no doubt, by some of the Plaintiff's witnesses, that, in point of effect, the work was virtually completed at the date of the service of the " *mise en demeure* " and that all that was required was merely some farther attention to certain details, and that if the Plaintiff had been allowed the short time usually found to be necessary after the setting up of such machinery to watch its working and correct the trifling defects which often occur in newly erected Sugar Houses, everything would have done well and no question would ever have arisen between the parties.

We think it is probable enough that if the time which was occupied by the Messrs. Hanning, the new engineers who were called in by the Defendant, after he served his "*mise en demeure,*" in examining the machinery, studying its defects and putting it in thorough working order, had been given to the Plaintiff, the same result would have followed and the work would have been effectively finished by the Plaintiff; for, Robert Hanning tells us fairly and candidly that " the " machinery was well enough put up (by Poculot) " if it had been finished. We had nothing to take " down of what Puculot had done, only to com- " plete. If Poculot had been allowed to go on, ' he would have been able to do what we have " done."

But, undoubtedly, the work was not finished at the stipulated or prorogated date, or even when the " *mise en demeure* " was issued, and accordingly we find the Hannings making a large charge for completing every thing. Those gentlemen examined as witnesses have sworn as follows:

Hugh Hanning. " From the 6th to the 19th " September we had to work almost night and " day to repair and complete what Poculot had " undertaken to do. During that interval we " had to work both on the Estate and at our " Works-Establishment. We had two work- " men on the Estate, and at our Works-Es- " tablishment the works were distributed among " our several workmen. We used the greatest " speed we could, in completing those works. " We were then busy with other works. I " think no other Engineer Establishment would " have completed the work more quickly than " we did, taking into consideration the proximity " of our works to the Estate *Antoinette*; the list " shewn me is the exact account of the work " done by us on account of the putting up of the " machinery of Poculot. I charged the Estate " $463 for the above works. The whole of those " works referred to the boiler and vacuum pans " and are included in Poculot's undertaking " marked A., and were indispensable for com- " pleting the fitting up and for making the crop."

And *Robert Hanning:* " It must have taken us " nearly 20 days in finishing the work mentioned " in Poculot's agreement and not completed by " him before the machinery and vacuum pan " were at work. The crop could actually begin " on the Estate, about the 14th September. " From the 6th to the 14th, we were constantly " at work to allow the Estate to begin the crop; " we used all possible speed working the whole " day and later. I dont think Poculot could have " finished in a shorter time than we did. We had " to do some of the works in our shop which is " only 3 miles from *Antoinette*, which allowed " us to do the works quickly."

In arriving at the conclusion that the work was not finished, even at the date of the *mise en demeure*, we do not forget that the witness Bourdin has deponed that the first " cuite " of sugar was made on the 4th September, the day on which he got formal notice of the dissatisfaction of the Defendant and on which he, Bourdin, left the establishment; that the sugar then made was placed in the coolers and that he was pretty well satisfied with the operation. But the great weight of evidence is quite the other way. The witnesses Ferran, Hugh Hanning and Robert Hanning, declare that no sugar was made till after Bourdin left the Estate and not till the 6th September or somewhat later, and they give substantial reasons for the fact being as they have deposed, viz.: that the state of the machinery was such, and among other things the defects in the iron waggon were so great that sugar could not have been made at the time spoken of by Bourdin, and they saw no traces of the operation which could not have escaped their notice if it really had been performed.

We are quite satisfied, on the evidence, that the work was not completed, even at the date of the *mise en demeure*, viz. the 2nd September 1867.

We may here notice a matter which engaged a goad deal of the attention of parties in the course of the trial, viz.- the question of whether in the present case the mere lapse of the term at which the work should have been completed, would entitle the Defendant to insist, at once, for his claim of damages. It was conceded, on all sides, that the old maxim of the Roman law *dies interpellat pro homine*, has not been admitted into the Civil Code and that consequently in the ordinary case, at least, the party wronged requires, before entering his suit in damages, to take some active steps, by way of a summons or other equivalent act, to put his opponent in legal *morâ*. C. C. 1139.

Some argument was also submitted to us on the part of the Defendant, tending to shew that the present case would really fall within the latter part of this article of the Code combined with the article 1146. The articles referred to run verbally as follows:

1139. " Le débiteur est constitué en demeure, soit par une sommation ou autre acte équivalent, soit par l'effet de la convention, lorsqu'elle porte que sans qu'il soit besoin d'acte et par la seule échéance du terme, le débiteur sera en demeure,"

1146. " Les dommages et intérêts ne sont dûs que lorsque le débiteur est en demeure de remplir son obligation, excepté,néanmoins,lorsque la chose que le débiteur s'était obligé de donner ou de faire, ne pouvait être donnée ou faite que dans un certain temps qu'il a laissé passer."

It was contended that the parties to the contract, in the present case, had clearly in view, when they entered into it, that the machinery to be set up was required for the coming crop, and that, therefore, the case was within the last part of the latter article and consequently, if the machinery was not duly delivered over at the date stipulated, it was too late for the object intended and the loss and damage could be sued for without any preliminary formal notice or summons.

On these questions it does not appear to us to be necessary that we should give a formal opinion, for the decision of the case does not, we think, depend upon their solution. It will be observed that we are in presence, here, of a formal *mise en demeure* preceding the raising of the present suit, and so, in any view whatever, the legal effect of the special words in the agreement, itself, might be, the Plaintiff has been formally put *in morâ* and the Defendant, so far at least, must be held to be *rectus in curia.*

But, at the same time, it must be remembered that the question still presents itself for determination from what date are we to hold that the party was in *morâ?* Is it from the 8th August, when the additional week admittedly granted to the Plaintiff, expired, or from the date of the *mise en demeure*, viz: the 2nd September following?

Now, this question, in the circumstances which actually occured, admits of a ready solution; for, the Plaintiff, after the 8th August and down to the date of the *mise en demeure*, continued the work with the full knowledge, approbation and consent of the Defendant. This is quite established by the evidence in process, both documentary and parole. (See, *inter alia*, the various notes sent from the Estate to the Plaintiff's workshop, dated 1st, 3rd, 15th, 22nd and 25th August *1867*, respectively.) It was not till the 2nd September, when the *mise en demeure* was issued, that the Defendant annoyed, apparently, at not finding the work completed on a certain day when he paid one of his usual visits to the Estate, and wearied out by the long delay, called upon the Plaintiff, formally, to deliver over the machinery completed in 48 hours, the result of which was, as we have already seen, the departure of the Plaintiff and his workmen and the abandonment of the work in its unfinished state. The period for the performance of the contract had been enlarged first by the express and then by the tacit consent of the Defendant, down to the date of the *mise en demeure*. Any claim for loss and damage owing to the non-completion of the work can, therefore, only date from the 2nd September when the Plaintiff was, for the first time, put *en demeure.*

To free himself from the claim of damages for not completing the work, the Plaintiff has put

forward two pleas which it will be convenient to notice in this part of our Judgment.

In the 1st place he has alleged that the delay was caused by the articles of machinery not having arrived in time from England, to enable him to put them up within the delay stipulated. To this the Defendant has answered that the Plaintiff had, himself, made all the necessary arrangements with the persons in England who were to supply the machinery; that he had taken the whole charge upon himself, having been employed at a high rate of remuneration to do so, and we find on the Plaintiff's account a charge of no less than $ 1,000 for preparing the plans and specifications of the various articles required, and sending the order to England.

It, therefore, might well be that the non arrival of the articles, in time, would not have been, in law, a valid excuse for the non completion of the contract of the stipulated term in a question between Mr Poculot and Mr Maroussem, the Plaintiff and Defendant in the present case; but the fact of the late arrival of the machinery has not been proved by the Plaintiff. On the contrary looking at the evidence, generally, and particularly at what the witnesses Bourdin, Lennet, Ferran, and Maissin, have deposed, we are satisfied that all the necessary pieces of machinery had reached the Estate in time to have admitted of the due completion of the work, within the time agreed upon, or, at all events, before the date of the *mise en demeure* of 2nd September which put the Plaintiff *in legal morâ*.

Again the Plaintiff has alleged, as an excuse for his procrastination, that the necessary mason-work on which the machinery was to be based and partly enclosed, was not completed in time to enable him to fulfil his contract; but this, again, has not been proved in evidence. We think the testimony, particularly of the witnesses Bourdin, Maissin, the Hannings, L'Amour and the mason Potin, shew that the Plaintiff was in no way hindered from completing the work by the want of the necessary masonry.

Potin has sworn that all the mason-work was finished by the 31st July; but be this as it may and it is obvious that as to adding the necessary piping to Boilers, Vacuum pans, etc., it is not required that all the surrounding mason-work shall have been completed before beginning the pipings. The operations may, to a certain extent, go on concurrently, and some portions of the mason-work can very well be executed after the piping is completed. So it is not necessary that all the mason-work should be completed before the Engineer can proceed to put up his sugar machinery. On the whole, we are quite satisfied that there is no evidence to support this plea of the Plaintiff: that he could not get on for want of the necessary masonry.

Having thus, so far, cleared the grounds, there is, still, one question of a preliminary or prejudicial nature which must be disposed of before the question of damages can be determined. It will be observed that it is not the Plaintiff who is here maintaining a claim of loss and damage for alleged violation of the contract to which he has been a party. It is, on the contrary, the Defendant who alleges that he has sustained great loss by the breach committed by his opponent and wishes in this suit to set off those loss against the Plaintiff's claim of payment for work and labor done and materials supplied to the Defendant's Estate. The competency of the Defendant taking up this line of defence in the present suit, has been challenged by the Plaintiff, but we think without reason, for, it is consistent with fair dealing with the established rules both of this Court and the Courts in Europe, that the Plaintiff, in a case like the present, must shew that he executed and completed his contract in a proper and workmanlike manner. The Defendant, when called upon to pay such an account as the present, for skilled labor, is entitled to say that the work has been badly done, or not done at all; and without the necessity of a separate and substantive cross-action, may, at once, and in his defense against the demand of the Engineer, shew that the loss directly arising to him is, at least, equal to the amount for which the latter has called the employer into Court. Of all this the workman cannot complain; the Court would protect him against any chance of unfair surprise by confining his opponent to his claim of direct and positive loss arising out of the workman's failure to do his duty. No doubt the employer may competently bring a cross-action, if he pleases, for the whole of his claims or for the excess over and above the amount of the Engineer's demand; but it obviously tends much to the shortening of litigation and the consequent saving of delay and expense to allow the question of direct loss and damage sustained by the Defendant thro' the fault of the Plaintiff, to be inquired into and set off in the suit for payment of the workman's account so far as may be necessary to compensate the demand of the latter The Court in the case of *Carbonel, Bourdin fils & Co.* v *Geffroy* and ors., in 1863, (PISTON's *Reports*, 1863, p. 34,) had occasion to notice and to give effect to this principle. What kind of damages the Defendant will be entitled to and to what extent he can in law be allowed to press his demand on that head, is another question altogether which we shall have occasion to consider immediately; but in the meantime we entertain no doubt that the Defendant may competently in the present action, set off in defence his claim for loss and damage occasioned by the fault of the Plaintiff.

The damages which the Defendant asks in the present case to be allowed to state against the Plaintiff's demand are of two sorts: the one more direct than the other. The first part is made up of the sum which the Defendant had to pay to the Messrs. Hanning for the completion of the work *i. e*: a sum which collecting all the items together, may be stated at $1000. The prices charged by those Engineers appear to have been very moderate. Hugh Hanning has deposed "that they (the prices) are below "our ordinary prices which we reduced on ac- "count of Mr. Poculot, because we were told, "at the time, that Poculot would be sued in "recovery of the amount. We might have "charged three times the amount and have got "it; for, the work was very pressing. We had "to work day and night."

The second part of the Defendant's claim in damage arises, as he alleges, from the non-completion of the work by the Plaintiff obliging him, the Defendant, to make the crop of 1867 at 2 Sugar houses instead of one, including the expense of putting the Sugar House of *Lucia* in repair, imposing upon him the cost of additional laborers, fuel, etc. He also says that the delay in commencing the cutting of the crop, resulted in a loss of a considerable quantity of Sugar, and he farther adds that the impossibility to sell off the machinery of *Lucia* Estate, as it was required to make part of the crop, the new machinery not having been finished in time, caused a considerable pecuniary loss to him. Of all these grounds of alleged damage, it might possibly be said that they are grounds of what is usually called in law indirect or consequential damage. But without attempting to define what class of damages those claims might belong to in legal logic, we think that the difficulty in the way of allowing damages beyond what the Defendant had to pay to the Messrs. Hanning, is insuperable.

We do not find in the case a sufficient amount of clear and direct evidence that any further damage was actually and really sustained by the Defendant. It is true that respectable witnesses have stated that they believed that the Defendant must have sustained considerable loss and damage generally, from the non completion of the work at an earlier date; that it is reasonable to suppose that working two sugar houses would cost more than working one; that more men were actually required; that the canes were really ripe for cutting, before the machinery was ready to pass them, and that consequently a loss of yield must have arisen, which they estimated at a high figure, but we do not find such clear and distinct evidence of positive facts known to the witnesses and resulting in loss and damage to the Defendant as a Court of Justice must require. It will be remembered that in the circumstances here, and looking particularly at the delays granted by the Defendant to the Plaintiff, the main ground of damage against the Plaintiff must be restricted to the loss arising from the 2nd September to about the 14th of the same month, *i. e.*, speaking generally, the time required by the Hannings to put every thing in good working order. The Plaintiff must make good the direct loss thence resulting, *i. e.*, the amount of the Hannings charges for doing what the Plaintiff ought to have done; but we are not in a position, for the reasons above stated, to allow any further or broader damages.

We have, in the last place, to consider the additional charges which the Plaintiff makes as extras beyond the deed of agreement of 1st July 1867. It is obvious that the burden of establishing very clearly those extra demands must be laid upon the Plaintiff, otherwise very great injustice might be done to the Defendant and Planters in his situation.

What is the case here? A Planter has contracted with an Engineer that the latter shall prepare and send to Europe a complete description and specification of a set of sugar-machinery costing a certain sum of money to be sent out to the Colony, and to be, there, set up by the Engineer who is to receive a certain fixed sum for his whole trouble in the matter. At the end of the day, the Engineer sends in an account for *extra*, which, he says, were not embraced in the original contract, and calls upon the Planter to pay a considerably larger sum than he bargained for. There might be no end of such demands, and a Planter who had laid aside a certain definite amount of money for his new machinery, perhaps all that he found he could, with prudence, devote to such a purpose, might find himself quite unexpectedly called upon to meet fresh and indefinite calls for additional articles of machinery and alleged extra work done by the Engineer. Such demands require to be very narrowly watched by a Court of Justice.

In the present case, looking at the general pinciple to which we have just alluded, and the evidence of the witnesses, particularly that of the Hannings, as to what items the original contract must, technically, be held to have embraced, we are not prepared to go beyond the amount admitted by the Defendant, viz: $616.15 and a charge of $40 in the account of the Hannings, and which Hugh Hanning says ought not to be paid for by the Plaintiff. The aggregate of those deductions is $ 656.15. Taking the price of the iron-waggon in the contract at $430, as spoken to by the Plaintiff's witnesses, without contradiction, we have in the contract the sum of $ 1,770 to which add the above sum of $ 656.15, making together the amount of $ 2,426.15. From this, deducting the account paid to the Hannings, or $ 1000. we have the sum of $ 1,426.15 for which we find the Plaintiff entitled to Judgment.

As to costs, it must be remarked that the Plaintiff has not been entirely successful in his suit. On the other hand, the Defendant has made no tender of any part of the Plaintiff's account, and has contended that in the circumstances the Plaintiff was entitled to recover nothing against him. We think the matter of expenses will be equitably disposed of by allowing the Plaintiff one half of his costs as they shall be taxed by the Master.

BANKRUPTCY COURT.

FAILLITE,—PREUVE.

Lorsqu'un failli notifie son intention d'attaquer le Jugement de mise en faillite, c'est au demandeur à prouver, de nouveau, l'état de faillite, et non au failli à prouver que ce Jugement prononcé contre lui est basé sur des faits erronés.

BANKRUPTCY,—TRIAL,—EVIDENCE.

When the Bankrupt undertakes to shew cause against the validity of the trial of Bankruptcy, the Petitioning creditor is called upon to begin and adduce all the evidence on which he means to rely in order to establish the trading, petitioning, creditor's debt, and act of Bankruptcy.

In Re:

BANKRUPTCY HONORÉ ROUESSART.

—

A. ROHAN,—Attorney for the Bankrupt.

—

27th September 1869.

Honoré Rouessart, alleged to be a distiller, was adjudicated a Bankrupt on the second August 1869, on the Petition of one Joseph Viger, alleging himself to be the assignee of one Louis Alcide Henry André, by an act under private signatures of the 28th July, duly registered.

The duplicate of the Order of adjudication was served on Honoré Rouessart in person, on the 9th September now last past. Honoré Rouessart gave notice to the parties interested, of his intention to shew cause to the Court of Bankruptcy against the validity of such adjudication, on Monday the 13th September, when, by consent the hearing was adjourned to the 20th September instant, when E. PELLEREAU moved on behalf of the said H. Rouessart, that the adjudication made on the Petition of the said Joseph Viger, alleging himself to be a creditor of H. Rouessart be annulled on the several grounds referred to in his notice of the 9th September.

L. ROUILLARD, in support of the adjudication of Bankruptcy put in the Judgment of adjudication, when he was called upon by E. PELLEREAU to establish the soundness of that Judgment, by adducing proof of the existence of the three conditions required by law in support of an adjudication of Bankruptcy, viz: 1o. the existence of the Petitioning creditor's debt; 2o. the trading, and 3o. the act of Bankruptcy alleged against the parties adjudicated a Bankrupt.

To this call, L. ROUILLARD demurred, and complained of the attempt made to throw upon him the *onus probandi* which the law has rightly laid to the charge of the party adjudicated a Bankrupt.

This point being quite new to me, and never having been taken before in the Bankruptcy Court, to my knowledge at least, I necessarily took time to consider the point raised. On pondering over it and searching for authorities on support of either view of the point raised, I was so fortunate to find in FONTBLANQUI'S BANKRUPTCY REPORTS of 1851, page 212, the very case cited by ARCHBOLD in support of the objection taken by E. PELLEREAU.

FONTBLANQUI'S *Bankruptcy Reports* not being in my hands in this colony, I do not hesitate to go to the trouble of quoting the case at full length in the very words of the Reporter, as they will, more fully, explain the arguments of the two Counsel engaged in this case, and the grounds of my conclusion on this point.

(Before Mr Commissioner GOULBURN.)

"This was a question of disputed adjudication under the Act 12 and 13 Vict. C. 106 S. 104, answering to Art. 53 of our Bankruptcy Ordidinance."

"Parry, Counsel for the Bankrupt.
"Bayley, Counsel for the Petitioning creditor.

"A preliminary discussion took place as to "the obligation of the parties to begin. On "the part of the alleged Bankrupt, it was "insisted that the Petitioning creditor was "bound, in the first instance, to examine his "witnesses and to establish the three requi-"sites necessary to sustain the adjudica-"tion, precisely as if there had been no previous "adjudication "Exparte,"

"On the other side, it was suggested that by "the express terms of the 104th Section, the "Bankrupt was to shew cause against the origi-"nal adjudication, to the satisfaction of the Court, "and if he failed so to do, within the period spe-"cified in the act, the original adjudication be-"came absolute without more, and from this "provision, it was argued that the petitioning "creditors had already established a *prima facie* "case, and could not be required, in the first "instance, to produce any evidence. It was ad-"mitted at the Bar that the practice in reference "to this question was not settled.

"Mr. Commissionner GOULBURN thought the "question so important as matter of practice, "that he consulted with his brothers Commis-"sionners EVANS & HOLROYD, and subsequently "announced that they had come to the unani-"mous conclusion, that in ordinary cases, and as "a general Rule, the Petitioning Creditor, upon "a disputed adjudication, should be called upon "to begin and adduce all the evidence on which "he means to rely, in order to establish the trad-"ing Petitioning Creditor's debt and act of "Bankruptcy.

"The Court, however, reserved to itself the "discretion of allowing the Petitioning Creditor to "adduce further evidence at any subsequent "stage of the proceedings, if further evidence "was decided necessary.

"BAYLEY, for the Petitioning Creditor, then "called the attesting witness to a deed of as-"signment for the benefit of creditors, which "was the act of Bankruptcy relied upon, and "the witness was cross-examined by PARRY "with a view to establish the objection relied "upon."

Upon the strength of this authority, on so important a point of practice, I do not hesitate in saying that I cannot do better than following a precedent so fully in point, not lightly laid down by Mr. Goulburn after a conference with his brothers commissioners who agreed with him in the unanimous conclusions announced by Commissioner Goulburn, on the point raised before him.

I therefore order that the Petitioning Creditor

do proceed with his case, as if there had been no adjudication exparte, and do prove the requisite conditions in support of the adjudication exparte obtained by the Petitioning Creditor against the alleged Bankrupt.

BANKRUPTCY COURT.

FAILLITE,—COMPÉTENCE.

Le Failli ayant attaqué le Jugement de mise en faillite, sur le motif que le demandeur n'était pas le véritable propriétaire de la créance affirmée par ce dernier, et ayant intenté une action devant la Cour Suprême, en nullité de l'acte par lequel cette créance avait été cédée au demandeur, la Cour a Jugé qu'elle ne devait point entendre l'affaire jusqu'à ce que la Cour Suprême se fut prononcée sur la validité du dit transport.

BANKRUPTCY,—JURISDICTION.

Where a Bankrupt had given notice of his intention to show cause against the validity of the Judgment of adjudication of Bankruptcy, on the ground that the Petitioning creditor was not the bonâ fide *holder of the claim affirmed by him, and had, moreover, entered an action before the Supreme Court, to obtain the nullity of the transfer made to such Petitioning creditor, of the claim by him affirmed as aforesaid, the Court ruled that the proceedings in Bankruptcy were to be stayed until the Supreme Court had decided upon the validity of the said transfer.*

In Re:

BANKRUPTCY E. ROUESSART.

A. BETUEL,—Attorney for the Bankrupt.

27th September 1869.

Elisée Rouessart was adjudicated a Bankrupt on the 2nd August one thousand eight hundred and sixty-nine, on the Petition of one Joseph Viger, alledging himself to be the assignee of one Louis Claude Henri André, by an act under private signatures of the 28th July 1869, duly registered.

The duplicate of the Order of adjudication was served on Elisée Rouessart in person. On the 9th September now last past, he gave notice to the parties interested, of his intention to shew cause to the Court of Bankruptcy against the validity of such adjudication on Monday 13th September instant, when by consent the hearing was adjourned to the 20th September instant.

When E. PELLEREAU moved, on behalf of Elisée Rouessart, that the adjudication made on the petition of the said Joseph Viger, alledging himself to be a creditor of E. Rouessart, be annulled on the ground:

1o. That Viger was not the lawful and bonâ fide owner of the claim upon which the adjudication complained of was made, of the 28th July one thousand eight hundred ond sixty-nine, duly registered, upon which he rests his claim against E. Rouessart.

2o. Because the assignment was bad in law, having been made without a valuable consideration and for the sole fraudulent purpose on the part of Henri André, through the instrumentality of the said Joseph Viger, of enforcing the execution of the Judgment of the 8th February 1865, by personal arrest against Elisée Rouessart, to which the said Henri André could not have legally resorted personally, from the fact of his being the brother-in-law of the said Elisée Rouessart.

E. PELLEREAU further stated that to try the illegality and fraud above complained of, an action had been brought by Elisée Rouessart, before the Supreme Court.

I have, under such circumstances, been asking myself, have put the same question to Counsel, until the Supreme Court shall have adjudicated on the issue pending between parties, what is the *Commissioner* to do?

L. ROUILLARD, for his client the Petitioner in Bankruptcy, held the Court competent, by reason of its original Jurisdiction in Bankruptcy matters, to proceed at once with the trial of the issue before it.

E. PELLEREAU for Elisée Rouessart, maintained the incompetency of the Commissioner to try an issue wherein a 3rd party was in attendance in the Bankruptcy Court, whose presence in Court could not have been enforced by the Commissioner (*Archb. Law and practice of Bcy. law*, p. 29).

Of two things one: either the issue raised before the Supreme Court will be found for Elisée Rouessart. If so it is superabundantly clear that the adjudication of Bankruptcy made against him, on the Petition of Joseph Viger, will have to be annulled by the Commissioner, on proof of the finding of the Supreme Court.

Should the issue be found in favor of Joseph Viger who has obtained the adjudication now disputed by Elisée Rouessart, it will be the duty of the Commissioner, on proof of such finding, to support such adjudication and to proceed thereon.

If so, is it not evident that my duty as Commissioner bids me stay my Judgment on the validity of the adjudication obtained Ex-parte at the hands of this Court until Judgment of the Supreme Court on the validity or non validity of the claim set up by Joseph Viger? Especially if it be found that the adoption of the course recommanded by Mr. ROUILLARD might lead to a conflict between the Superior Court and the Commissioner, were these judicial powers to come to a contrary decision on one and the same issue.

If so which of the two decisions would prevail? should the Commissioner's Judgment contradict that of the Supreme Court, there is no doubt that on appeal from the Commissioner's Judgment, the latter will be quashed.

If so, proceeding now with the immediate trial insisted upon, will be a mere waste of public time and entailing useless cost upon parties apparently insolvent.

For those several reasons, I have come to the conclusion that the trying of the validity of the adjudication disputed by Elisée Rouessart shall be stayed until Judgment shall have been given by the Supreme Court and on the issues submitted it, by E. Rouessart.

All the rights of all parties are fully reserved, as well as the question of the costs already incurred before the Bankruptcy Court.

SUPREME COURT.

DIVORCE,—SÉVICES ET INJURES GRAVES.

DIVORCE,—SŒVITIA AND "INJURES GRAVES,"

DU RHONE DE BEAUVAIR THE WIFE,—Plaintiff,

versus

DU RHONE DE BEAUVAIR THE HUSBAND,—Defendant.

Before:

His Honor N. G. BESTEL and
His Honor G. B. COLIN.

L. ROUILLARD,—Of Counsel for Plaintiff.
J. PIGNEGUY, —Plaintiff's Attorney.
E. PELLEREAU,—Of Counsel for Defendant.
A. ROHAN, —Defendant's Attorney.

28*th October* 1869.

This was an action for a Divorce *a vinculo matrimonii* by the wife of the Defendant, on the grounds of "sœvitia" and "injures grâves," fully set out in the Plaintiffs' Petition.

The facts relied upon by the Plaintiff were denied by the husband, and had, therefore, to be proved by the wife.

This she did, and the counter proof was made by the Defendant.

On the closing of the enquiry, the Defendant hesitated not in expressing his regret at the course adopted and insisted upon by his wife, which he ascribed to the evil counsel of those whose duty it was to have impressed on her mind a contrary course of action. He further disputed the sufficiency of Plaintiff's evidence to warrant the conclusion to which she was anxious to lead the Court and added that in spite of all the facts alleged against him by his wife, supported as they had been by the biassed evidence adduced by the Plaintiff, he, nevertheless, felt the greatest sympathy for the disappointments of one whose existence had been embittered by a change, not in his affections, but in his pecuniary position. It is that sympathy which led him to desist from the divorce by mutual consent to which he had, at one time, assented, the relinquishment of which led to his wife's present demand. That he hoped that the anxiety he then expressed of having his wife back under the conjugal roof where her husband anticipated the joy of welcoming her back and of making up for apparent past harshness by the exhibition hereafter, of the kindest and most affectionate regards for her feelings and welfare as well as for her person as a lady and a wife, would lead the Court to dismiss the action now pending.

This language however calculated to enlist the feelings of the Court in favor of the Defendant, cannot be however of much weight in presence of the facts before us, for it is impossible that the Defendant should feel any sympathy for one of so degraded a character as he has represented his wife to be, publicly charging her, as he has done, with having been his mistress before their marriage, and to have led a dissolute and criminal life after and pending the marriage.

If from the "injures graves" we pass on to the "sœvita" charged, these appear to us as fully proved as the mischief done to Plaintiff's character.

Hence the necessity on our part, however painful or repugnant it may be to our feelings as men and Judges, in conformity with the conclusions of the "Ministère Public," to allow the Divorce prayed for.

We, accordingly, authorize the Plaintiff to summon the Defendant to appear before the competent Officer of the Civil Status, who is hereby authorized and empowered to pronounce the Divorce *a vinculo matrimonii* of the parties in the cause. Costs against Defendant.

BAIL COURT.

COUPS ET BLESSURES,—CAPITAINE ET SECOND,—LIVRE DE BORD,—MERCHANT SHIPPING ACT,—APPEL D'UN JUGEMENT DU MAGISTRAT DE DISTRICT.

L'Article 243 *paragraphe* 6 *du "Merchant Shipping Act," qui établit une pénalité contre tout marin qui frappera le Capitaine ou le Second d'un navire, s'applique également au Second lorsqu'il aura frappé le Capitaine.*

Lorsqu'une plainte sera portée devant le Magistrat par le Capitaine d'un navire contre l'un des marins engagés à son bord, le Capitaine devra produire le Livre de Bord à l'appui de sa plainte ou prouver que cette production est impossible, faute de quoi sa plainte sera rejetée.

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ASSAULT,—MASTER AND MATE,—OFFICIAL LOG-BOOK,—MERCHANT SHIPPING ACT,—APPEAL FROM A CONVICTION OF DISTRICT COURT.

Article 243 Sect. 6 of the "Merchant Shipping Act," which enacts a penalty against seamen for assaulting any Master or Mate of a ship, applies to the Mate when the latter is convicted of having assaulted the Captain.

Where a complaint is lodged before the Competent Court by the Master of a ship against any seaman engaged on board such ship, the official Log-Book of the ship, with the entry of the facts complained of, must be produced in Court, or the proof that such production is not practicable must be made, failing which such complaint shall be dismissed.

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LACAZE,—Appellant,

versus

THE QUEEN,—Respondent.

—

Before:

His Honor SIR C. F. SHAND, Chief Judge.

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W. NEWTON, —Of Counsel for Appellant.
H. BERTIN, —Appellant's Attorney.
E. J. LECLÉZIO,—Actg. Sub. Proc. & Adv. Gen.
J. BOUCHET, —Queen's Attorney.

—

30th October 1869.

This was an Appeal from a Judgment of the Junior District Magistrate of Port Louis, sitting on the criminal side.

On the 30th of last month, *Jules Lacaze*, Chief Officer on board of the British Ship "*Northumberland*" lying in the harbour of Port Louis, was brought before the said Magistrate, charged with having, on the previous day, inflicted blows with a belaying pin on the person of *William Ford*, Master of the vessel. With consent of the accused, the trial took place next day, viz: the 1st of the present month of October. The Master, the said William Ford, and three other witnesses, were examined for the prosecution, and three witnesses were heard for the defence. The Magistrate, in his Judgment, stated that in virtue of the "Merchant Shipping Act" 1854 (17 & 18 Vict. C. 104, § 243), he convicted the accused of having wilfully and maliciously inflicted blows upon the person of the said William Ford, and sentenced him to imprisonment for one calendar month and a day, and also to pay 5 sh. of costs, and in default of payment, he ordered the accused to be imprisoned for the space of two days longer.

Lacaze appealed.

W. NEWTON, for Appellant: this conviction must be quashed. In the first place, Section 243, of the "Merchant Shipping Act," on which the conviction is expressly founded, does not apply to the case. It is therein enacted that "If any Seaman who has been lawfully engaged, or any apprentice to the sea service, commits any of the following offences he shall be liable to be punished summarily as follows; that is to say under Head 6th of this Section, for assaulting any *Master* or *Mate*, he shall be liable to imprisonment for any period not exceeding twelve weeks with or without hard labor.

Now, the accused himself is here the first Officer or Mate, he is not one of the seamen. No doubt it will be pleaded that in Section 6th of the Statute, it is declared that the word "Seamen" shall include "every person (except Masters, Pilots, and apprentices *duly* indentured and registered) employed or engaged in any capacity on board a ship;" but I contend that the way in which § 243 is expressed, is exclusive of this interpretation. The Master and Mate are made to stand by themselves, alone, as the superior officers of the ship; they are the parties who may complain under this section against the seamen for assault; but the Mate cannot complain against himself for assault which would be an absurdity; yet that is the interpretation for which the Crown contends, as it says that the word "Seaman," here, includes the Mate. The alleged assault, in the present case, must have been tried, if at all, under the common law; but as the Magistrate tried it erroneously under the section of the Statute, it must be set aside.

In the second place, I have a still more serious objection to the proceedings before the District Court. The official Log-Book of the ship was never produced. This, under the Statute, is essential and cannot be dispensed with. In the section immediately following the one on which the conviction is made to lie, viz. Sect. 244, we have this plain injunction of the Legislature: "Upon the commission of any of the offences enumerated in the last preceeding section, an entry thereof shall be made in the official Log-Book, and shall be signed by the Master and also by the Mate or one of the crew, and the offender, if still in the ship, shall before the next subsequent arrival of the ship at any port, or, if she is at the time in port, before her departure therefrom, either be furnished with a copy of such entry or have the same read over distinctly and audibly to him and may, thereupon, make such reply thereto as he thinks fit; and a statement that a copy of the said entry has been so furnished, or that the same has been so read over as aforesaid, and the reply, (if any) made by the offender, shall, likewise, be entered and signed in the manner aforesaid; and in any subsequent legal proceedings, the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or proof, the Court hearing the case, may, at its

discretion, refuse to receive evidence of the offence."

At the trial there was not one word said about the Log-Book. It was never mentioned. No enquiry was made as to whether the entries had been duly made or not made, and whether it was practicable to produce the Book or not. There was plainly, here, a positive departure from the Statute and something was omitted which may often prove a strong safeguard of the accused, viz : the entry made at the time of what actually took place, and what the accused had then to say for himself. It was incompetent for the Magistrate to go on in the way he did. His discretion to refuse to allow evidence of the offence only opened to him after he was satisfied that it was not practicable to produce the Log-Book; but, in point of fact, no enquiry at all, regarding the Log-Book was made, and thus the proceedings are vitiated from the beginning.

E. Leclézio *Junior, contrà.*—As to the first objection raised, the word " seaman " in one of the opening sections of the act is declared to include " every person " (with certain exceptions) on board the ship. The exceptions are : " Masters, Pilots and apprentices." Now, the Mate or first Officer is not one of them. So he is expressly included in the term " seaman."

The reason of the " Master or Mate " being put together in § 243 (6) is this. They are the the Superior Officers of the Ship; assaults upon them are of the most dangerous tendancy. The Master is often absent, and then the Mate has the command of the vessel.

But what is conclusive upon this point, is the consideration that there is no other Section of the act under which the Mate could be punished for assaulting the Master.

In the second place, in the circumstances of the case, as shewn by the evidence, it was impossible to produce the Official Log-Book at the trial. The assault was committed late on the afternoon of the 29th September, the accused was apprehended, soon after and taken to Jail by the Police, and the trial took place on the 1st October. In such circumstances, different entries which might otherwise have been made in the Log-Book, could not have been made, and therefore the objection must fail.

THE COURT.

This case was argued before me on Wednesday last, and for obvious reasons I am desirous that is should be disposed of as speedily as possible.

The charge against the Appellant *Lacaze*, is a very serious one. He is the Mate or first Officer of the ship " *The Northumberland.*" He is accused of having committed a violent assault upon his superior officer *William Ford.* I need not say that there are few persons placed in a situation of greater trust and responsibility than the Master of a ship. His authority must be supported, and all cases of serious insubordination on the part of his officers or crew, particularly when accompanied with violence, will be severely dealt with by a Court of Justice.

The objections to the present conviction do not touch the merits of the case in the sense of actual guilt or innocence of the accused, but they raise the important question of whether the accused has been well tried according to law, and both objections are worthy of the serious attention of a Court of Review.

I shall consider them in the order in which they are stated by the Counsel of *Lacaze.*

As to the *first* objection, there certainly is an awkwardness in the way in which the 6th division of Art. 243 of the Statute is worded.

This sub-section of the act relates to assaults upon officers of the ship, and it is said that whenever any seaman who has been lawfully engaged, or any apprentice to the sea service commits any of the following offences, he shall be liable to be punished summarily as follows; Among other offences we have the following: " XX " (6) — For assaulting any Master or Mate, he shall be liable to imprisonment for any period not exceeding twelve weeks, with or without hard labor."

Now, *prima facie*, this enactment would not apply to the present case, for, the accused is here the Mate or First Officer of the Ship, *i.e.* one of the persons for whose protection the above clause is drawn, and not one of those who, at first sight at least, could be charged with the offence set forth, and be punished under it, on the charge being proved against him. But then, in what is sometimes called the " Dictionary Clause " of the Statute, we are instructed by the Legislature as to the meaning to be attached to the word " Seaman " when it occurs throughout the act. This word, it is said, shall include every persons, (except Masters, Pilots and apprentices duly indentured and registered) employed or engaged in any capacity on board any Ship, " XX," if not inconsistent with the contestor subject matter." Therefore the word " seaman," here, will include the " first Officer or Mate, for, unlike the Master, he is not excepted from the clause, and there is no inconsistency in so including the Mate, for altho' the words " Master or Mate " stand together, as we have seen in S. 243 of the act, the Mate may be guilty of assaulting the Master and must be tried for the offence. In fact, no other clause in the act has been pointed out under which such a prosecution as the present could be supported, and as the Statute approaches very much to what may be termed a Code in regard to " Merchant Shipping," this consideration adds much to the weight of the argument in this part of the case submitted by The Substitute Procureur General. In those circumstances I should not feel myself in a position to sustain the first objection pleaded by Mr. Newton, for the Appellant.

The *second* objection is founded on the non production of the official Log-Book at the trial, or the proof that such production was not practicable. It appears to me that here there has

been a miscarriage at the trial, the provisions of the act in this respect not having been observed. The section of the Statute immediately following the one we have already had occasion to consider (§ 244) is thus expressed : " Upon the commission of any of the offences enumerated in the last preceding section, an entry thereof shall be made in the Official Log-Book, and shall be signed by the Master and also by the Mate or one of the crew, and the offender, if still in the Ship, shall, before the next subsequent arrival of the ship at any port, or if she is at the time in Court, before her departure therefrom, either be furnished with a copy of such entry or have the same read over distinctly and audibly to him, and may thereupon make such reply thereto as he thinks fit, and a statement that a copy of the said entry has been so furnished or that the same has been so read over as aforesaid, and the reply (if any) of the offender, shall likewise be entered and signed in the manner aforesaid ; and in any subsequent legal proceeding the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or proof, the Court hearing the case, may, at its discretion, refuse to receive evidence of the offence."

I need scarcely say that the Official Log-Book occupies a very conspicuous place in the economy of the merchant shipping of Great Britain engaged in Foreign Trade. The keeping of it is one of the duties imposed by the Statute, upon the Master, under heavy penalties. It must contain an entry of every occurrence in the progress of the ship from one port to another and when in harbour, which can affect any one connected with the vessal ; in short says Lord *Tenterden* or his Editor (page 133), almost " every occurence which can happen in the course of a voyage,to affect the interest personal or pecuniary of the owner, Master and seamen,the discipline and safety of the ship,or the ends of Justice,must have its place in the Official Log-Book." In the section of the act which has just been cited, it is ordered that in the legal proceedings following upon any of those occurrences, the entry in the Official Log-Book shall, " if practicable, be produced, or proved."

Now, in the present case, the entry in the Log-Book was not produced or proved,and nothing appears on the record to shew that it was not practicable to prove it. In fact, no notice of the Log-Book appears in the proceedings, from beginning to end. But farther there is a very material section of the statute which declares that all entries made in any official Log-Book " shall be received in evidence in any proceeding, in any Court of Justice subject to all just exceptions." Now, this evidence was altogether wanting in the present enquiry. It is manifest that the entries of the occurrence in the Log-Book may be very material for enabling the Court before which the trial may take place, to ascertain the real truth and justice of the case. At all events, those entries are declared in the act,to be evidence in the case, which must be produced when practicable, and it is manifest that as the official Log-Book was not produced, nor the impracticability of producing it proved before the Court, the case has not been tried in terms of law, and the proceedings must be set aside.

It was argued before me that in the circumstances which occurred, there could have been no entry in the official Log-Book. But I was not able to follow the reasoning, even supposing that it were still in time to shew the impracticability of producing the Log-Book at the trial, which I do not think it is. I am of opinion that at the trial itself, the Log-Book should have been produced or it should have been shewn that it was impracticable to produce it. It is now too late to go into such an enquiry. But even if the enquiry were competent, the offence having been committed, as alleged, on the 29th September, and the trial having taken place two days thereafter, viz : on the 1st October, while all the persons concerned were in the town of Port Louis, on board of the Ship in the harbour, it is difficult to see what there was to prevent the Master making the entries as required by the act.

But, as I have already said, it appears to me that the impracticability, if it existed, should have been shewn at the trial, if the Log-Book was not produced, and that this not having been done, the proceedings were not duly had, in terms of Law, and must, therefore, be set aside.

The conviction is quashed ; but in the circumstances, without costs.

SUPREME COURT.

APPEL AU CONSEIL PRIVÉ,—EXÉCUTION PROVISOIRE,—FRAIS.

En cas d'appel au Conseil Privé, l'exécution provisoire du Jugement sera accordée ou refusée, en tout ou en partie, suivant les circonstances de la cause et aussi suivant que cette éxécution se trouvera en rapport avec le but que se propose la Justice.

Circonstances dans lesquelles la Cour a accordé l'exécution provisoire de son Jugement quand aux frais seulement.

APPEAL TO THE PRIVY COUNCIL,—PROVISIONAL EXECUTION,—COSTS.

Applications for execution pending appeal to Her Majesty in Council, will be granted or refused in whole or in part according to the actual circumstances and according to what will best promote real and substantial justice in each case.

Circumstances under which the Court has ordered its Judgment to be executed for costs only and not on the merits.

GALDEMAR FRERES,—Plaintiffs,

versus

WIDOW DIORÉ,—Defendant.

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Before :

His Honor Sir C. F. SHAND, Chief Judge and
His Honor JUSTICE BESTEL.

—

P. L. CHASTELLIER,—Of Counsel for Plaintiffs.
F. VICTOR, —Plaintiff's Attorney.
E. PELLEREAU, —Of Counsel for Defendant.
J. MERCIER, —Defendant's Attorney.

—

6th November 1869.

On the 10th June of the present year 1869, the Supreme Court pronounced Judgment dissolving a Civil Partnership which had been entered into on the 28th October 1867, between Galdemar frères, Merchants, in Port Louis, the widow Pierre Dioré and Julius Wilson, for the cultivation of the Sugar Estate *Richfund* in the District of Flacq. The duration of the contract of Partnership was for nine years.

The Plaintiffs in that suit were the said Galdemar frères and the Defendants, Mrs. Dioré and J. J. Wilson.

In the decree dissolving the Partnership, there was also a finding of costs of suit against Mrs. Dioré. She appealed against the whole Judgment of the Court to HER MAJESTY in Her Privy Council.

The parties who had been successful against her, in this Court, Messrs. Galdemar Frères, presented the present application for interim execution of the Judgment of the Court, of 10th June last, so far as it related to the costs, which amounted to £259.12 offering due security to repay the amount, in the event of a reversal of the Judgment in the Court of last resort.

This motion was opposed by E. PELLEREAU for Mrs. Dioré, who argued : The final Judgment of this Court cannot be divided into parts, and execution asked of one part while it is not moved for as to another.

The question of costs must follow the fate of the Judgment itself, of which execution is not asked. By the rules of the Code of Civil Procedure, interim execution as to costs alone, cannot be granted by the Court, art : 137. There are third parties interested in this case and by the rules of the same Code, there can be no interim execution in such cases where an appeal has been entered.

P. L. CHASTELLIER in support of the motion : The case must be ruled by the Charter of Justice of 1831. The rules of French Procedure don't apply to the case. The Court has, in former instances, allowed interim execution for a part of the case, and refused it as to others. See *Adler & Ors v. Bréard & ors* 26th August 1864. (PISTON'S *Report Vol. IV p.* 94.)

THE COURT.

In all discussions of this nature, we must, necessarily, be governed by the Order in Council of 13th April 1831. for the better administration of Justice in the Colony of Mauritius and its dependencies. It has fixed certain precise rules for our guidance to which we must conform ourselves. The words of the said Order in Council or Charter of Justice, as we often term it, applicable to the matter now before us, run in the following term :

"And it is hereby further ordered, that it shall and may be lawful for any person or persons, being a party or parties to any Civil suit or action depending in the said "Cour d'Appel" of the said Island of Mauritius, to appeal to His Majesty in Council, His Heirs and Successors, in His or Their Privy Council, against any final Judgment, sentence or decree of the said Court, or against any Rule or Order made in any such civil suit or action having the effect of a final or definitive sentence and which appeals shall be made subject to the Rules, Regulations, and limitations following, that is to say ; in case any such Judgment, Decree, Order or Sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of £1,000, or in case such Judgment Decree, Order or Sentence shall involve directly or indirectly, any claim, demand or question to or respecting property or any Civil right amounting to, or of the value of £1,000 or in case the same shall affect the right of any person to freedom, the person or persons feeling aggrieved by any such Judgment, Decree, Order or Sentence of the said "Cour d'appel" may, within 14 days next after the same shall have been made, pronounced or given, apply to the said "Cour D'appel", by Petition, for leave to appeal therefrom to His Majesty, his Heirs and Successors, in His or Their Privy Council, and in case such leave to appeal shall be prayed by the party or parties, who is or are directed to pay any sum of money or perform any duty, the said "Cour d'appel" shall, and is hereby, empowered either to direct that the Judgment, Decree, Order or sentence appealed from shall be carried into execution, or to direct that the execution thereof shall be suspended pending the said appeal, as to the said Court may, in each case, appear the most consistent with real and substantial Justice ; and in case the said "Cour d'appel" shall direct such Judgment, Decree, Order or Sentence to be carried into execution, the person or persons in whose favor the same shall be given, shall, before the execution thereof, enter into good and sufficient security to be approved by the said Court, for the due performance of such Judgment or Order as His Majesty His Heirs and Successors, shall think fit to make thereupon."

The Court is empowered as will be seen from the above clause "and in case such leave to appeal shall be prayed by the party or parties who is or are directed to pay any sum of money or perform any duty, the said "Cour d'appel" shall and is hereby empowered either to direct that the Judgment, Decree, Order, or Sentence appealed from shall be carried into execution, or to direct

that the execution thereof shall be suspended, pending the said appeal as to the said Court may, in each case, appear the most consistent with real and substantial Justice."

We do not think that there is anything in this Charter or in principle to prevent us granting execution of a part of the general final Judgment, altho' execution in the meantime is not asked of the whole Judgment of the Court.

It may happen that it would not be consistent with real and substantial Justice to allow interim execution of whole Judgment involving the rights of many parties, and it might be rights of such complexity that execution, in the meantime might rendered them well night if not totally, inextricable, when the Judgment of the Privy Council should ultimately be pronounced. But the Court might see its way clearly to allow execution of a portion of the general decree, in the meantime, on proper security being found as quite consistent with the rights and interests of parties to the suit. Of this the case of *Adler v Bréard*, referred to from the Bar is a good example. The Court, there, granted interim execution of the general decree so far as it related to certain of the parties and there rights, but refused it as to other parties and their interest in the Judgment, as the Court was of opinion that interim execution of the whole Judgment would not only, not be consistent with real and substantial Justice, but might throw matters into such a position, that the ultimate Judgment of the Privy Council might be rendered nugatory or abortive. In the present case the successful parties have not asked interim execution of the whole Judgment because as they tell us the rights of third parties might be seriously affected, and after interim execution the state of things might be so altered that it might be very difficult to put the final decision of the Privy Council in force. They confine themselves to asking interim execution of the Judgment for costs. This is a part of the case which stands out by itself clear and separate from the general Judgment on the merits and as to which we think we can order execution to issue, on proper security.

We, accordingly, hereby allow interim execution for the said costs, on satisfactory caution being formed for repayment in the event of a reversal before the Committee of the Privy Council; with cost of the motion against Mrs. Dioré.

BANKRUPTCY COURT.

FAILLITE,—LIVRES,—CERTIFICAT.

Il ne suffit pas que le commerçant tienne des livres, il faut que ces livres soient bien tenus, et balancés de temps à autre de façon à ce qu'à toute époque l'état réel des affaires du commerçant puisse être immédiatement connu.

BANKRUPTCY,—BOOKS,—CERTIFICATE.

It is not sufficient that there should be books, they must be properly kept and balanced from time to time, so that, at any time, the real state of the trader's affairs may, at once, appear.

In Re

BANKRUPTCY CH. DOMAIN.

Before His Honor N. G. BESTEL.

8th November 1869.

I am called upon this day to adjudicate on the motion made by the Bankrupt, for a certificate of comformity to which I have been told he was entitled.

His title or right to a certificate was, however, strongly denied and opposed by the trade-Assignees who bitterly complained of the conduct of the Bankrupt, as a trader, on several grounds.

I shall deal, for the present, with the first objection which refers: 1o to the absence of books up to a certain period, and 2dly to the imperfect manner in which the books produced were kept.

Charles Domain began business in 1854 with a sum of $2,500, placed at his disposal, by one Lory, on the understanding, as it appears from Bankrupt's statement, that, should the trade then about to be entered upon prove successful, the net profit should be equally divided between Lory and himself: If not, Lory would have to bear the loss of the money advanced by him.

The 1st year the $2,500 invested by Domain produced a net profit of $10,000 which was shared between parties.

But from 1854 to February 1859 not a scrap of paper has been produced to throw the least light on the transactions between Lory and Bankrupt. What those transactions were, of what nature, what their extent? we have no means of ascertaining. The Bankrupt, however, in mentioning the existence of a "Sous seing-prive" between himself and Lory, took care in the same breath to inform us that his copy thereof had been handed over by him to Lory, in compliance with the wish expressed by Lory in his letter to Domain, of the 30th August 1864,—whereby he recommended to Domain the destruction of letters and "pièces inutiles" and requested the old books to be sent to him; and yet the Bankrupt says that from 1854 till 1859 he had kept no books but was in the habit of making out a yearly inventory from 1859 to 1861 or 1862, and subsequently took very precise notes of his assets and liabilities which he submitted to Lory, at Reunion Island, and upon which a yearly settlement took place between parties.

So much for the veracity of the Bankrupt, and for the absence of books from 1854 to 20th July 1859 when the Bankrupt began to keep

books He tells us that a journal by double-entry was then kept by him, a fair copy of which was never made, but the original or rough of which has been handed over to the official Assignee. This journal, however, and the other books in Court have been all so badly kept that it has been impossible for the trade Assignees to ascertain the *true* and *real* state of Domain's affairs after a personal minute examination of the books produced. The Accountants called in to their assistance by the Assignees, have not been more successful in their labors; and they agree with the Assignees, in stating that the difficulty of their task arose from the imperfect and untrade-like manner in which the Bankrupt's books have been kept.

The Bankrupt and his Accountant on their respective examinations were unable to give any satisfactory answers to the various entries to which their attention was directed, and stated their inability to remove the difficulties pointed out without a more minute reference to the books. The Court, therefore, ordered that the books of the Bankrupt should be put at his disposal and of his Accountant by the trade Assignees, who hastened to comply with the orders of the Court. Re-examined after reference by him and his Accountant to the books, neither the Bankrupt, nor accountant,could explain the irregularities apparent on the face of the books. And it was not until the certificate sitting that the Bankrupt on seeing the opposition of the trade-assignees to the allowance of the certificate moved for, that the Bankrupt, through his Counsel, gave certain explanations which, however plausible at first sight, might prove anything but satisfactory on further reflection. The late hour at which they were ushered in (viz) when the Assignees had all but closed their case, is a fact which militates very much against their having with the Court, the weight to which they would have been otherwise entitled had they been afforded at an earlier stage of the proceedings, when the Court and the Assignees would have had ample time to inquire into their merits. Of this advantage, however, the Court and Assignees have been deprived.

Had the Bankrupt's books been properly kept, as they should have been, they would have spoken for themselves, and there would have been no necessity for such numerous explanations, however truthful they may be, because there would have been no room for them. As justly observed by Commissioner *Fonblanqui* in re *Smart* and several other cases (*Fonblanqui's* Reports of cases in Bankruptcy 1849 to 1852 page 14.)

"It is not sufficient that there should be books, they must be properly kept and balanced from time to time, so that at *any time* the *real* state of the traders affairs may *at once* appear ?"

This desideratum is certainly not to be found in this case. The state of the books is such that it would have been impossible that, at any time ; the real state of Ch. Domain's affairs should at once appear from his books, whether referred to by Ch. Domain personally or by any of his creditors as anxious as himself to ascertain the real state of his affairs before or after insolvency. Some errors, of course, may and must be expected to creep into the best kept books, but those errors are, generally, of a trifling character, easily to be discovered, at all events not so numerous and so gross as those noticed in Domain's books, not of such a nature as to deceive the trader and his creditors as to the real state of the trader's affairs.

This is not all : In book No. 103 the knife of the accountant has been in use ; nearly *forty* folios have been cut off. The accountant tells us that those cuttings were made by him, of his own accord, and without the knowledge or privity of the Bankrupts, for the following reasons : 1o because certain entries had erroniously been made therein.. 2ly in order to make the book look neat, and 3ly because he did not believe that the book could be of any use hereafter to any one else but Domain.

The cuttings are at the opening of the book; They are so numerous and so apparent that the damage done to the book could not escape the notice of the Bankrupt. They must have caught his eye. And yet Domain far from reprimanding or dismissing from his service the accountant who had taken such an unwarrantable liberty with the book, continued to employ him as accountant and did not even enquire what he had done with the missing folios which the accountant tells us " were torn up by him."

We are quite in the dark as to the transactions of Domain with Lory ; as already observed, might not those missing folios have thrown some light on those transactions, notwithstanding the belief expressed by the accountant of their utter uselessness to any else but Domain ?

But say that the missing folios had no reference to the transactions between the Bankrupt and Lory, they might have revealed other facts, the knowledge of which might have been of a greater or less importance to the Bankrupt's creditors or to the Bankrupt, personally. The cutting off of those folios assume a more serious aspect when it is considered that the accountant cannot speak positively as to their contents. It is true that Hily the accountant says that he is ready to swear that the settlement with Lory formed no part of the contents of the missing folios, forgetting, at that moment, that he had unhesitatingly said on oath, a few lines before : " I do not remember what was in them " (the missing folios.)

To sum up, I have before me a trader who, for many years, was carrying on an extensive trade ; who from 1855 to 1859 kept no books ; who on the suggestion and at the request of one who had aided him in his trade, whether as a friend or as a money-lender, was a partner : had thought fit to part in favor of Lory with whatever books or notes kept by him as well as the " sous seing-privé " existing between himself and the money-lender : who from 1859 to the date of his bankruptcy did keep several books, it is true, but so imperfectly that it would have been, as it has lately proved, impossible for him or any of his creditors having an equal interest with himself, to know the real state of his affairs at " any given

moment" to ascertain the same on reference to the books kept and now produced. Further, that trader saw the mutilations of book No. 103, never reprimanded his book-keeper for the removal of the 40 folios missing on the face of the book, though the cutting off those folios could not but have struck his eye, being at the opening of the book. He never took the trouble of enquiring what had become of the missing folios and what was their contents.

I have been told the fault lay not with the Bankrupt but with his accountant.

To deprive him of a certificate would be rendering the Bankrupt responsible for the acts and deeds of a third party, which would be not only harsh but inconsistent with equity and the rule of law which requires that the guilty party and he *alone* should bear the penalty to which he may have rendered himself amenable by his own personal misconduct. This would be true, had not that trader sanctioned and ratified the acts and deeds of his Accountant: 1o. By his not having reprimanded him for the unwarrantable liberty he had taken with his books, &c. 2dly By having preserved in his employ an Accountant who acknowledges that such cuttings as those above pointed out "ought not to be done in book-keeping," and who has committed the gross errors to which his attention was called when under examination, even after a minute inspection of the books kept by him.

But the question in such a case as this is not so much one of punishment as one of *immunity*, the question being whether a trader who has so conducted himself shall be permitted to *resume trading without paying his creditors*, or in the words of the *Lord Justice Cranworth*, the question is not as to the *proper quantity of punishment* to be inflicted upon the Bankrupt, but whether this Court ought to sanction the re-entry of the Bankrupt into business, without having *previously paid his debts in full*, (Ex-Parte *Curties*, Bankruptcy Appeals, 1851 to 1856) in which case of appeal by the Bankrupt from the refusal of his certificate, the Petition was dimissed with costs and all protection refused.

I may add with *Lord Justice Knight Bruce* in his Judgment in the case above, other circumstances might be noticed; but without laying stress on more minute facts, I find those which I have already mentioned before me, and I am asked in the exercice of a judicial discretion of a tribunal having to a certain extent the judicial administration of the affairs of commerce, to give the passport of such a tribunal to this man to enable him to enter again into trade. It is a demand without a pretext; it is a demand without colour, and I do not recollect a case where a certificate has been asked in which there were more plausible and irresistible grounds for refusal.

And concluding my Judgment in the words of the "Lord Justice Knight Bruce," I can well say for my part and so far as my Judgment is concerned, I dismiss the Petition, refuse the certificate and refuse any protection whatever, with costs."

HENRI DOMAIN.

The motion, for a Certificate, by the Bankrupt Henri Domain, was resisted by the Trade-Assignees, on the same grounds as those stated in their opposition to the motion of Charles Domain to a similar end.

My reasons for refusing a Certificate to Ch. Domain apply equally to the case of Henri Domain. The irregularities apparent on the face of Henri Domain's books, his personal inability and the inability of his accountant, satisfactorily to explain the irregularities pointed out to him and to his accountant, even after a minute examination of the books, the alterations of figures at the opening of his book No. 2, the alleged wrong entries, the counter entries to amend such alleged wrong entries altogether unaccounted for, and the late hour at which an attempt was made by Counsel to explain away the charges directed by the Assignees against the Bankrupt, have led me, upon the strength of the authorities quoted at length in my Judgment, on the motion of Ch. Domain, to refuse, as I do refuse, the Certificate prayed for, and further refuse any protection whatever, with costs.

J. MAUREL.

This was a motion by the Bankrupt for the granting of a certificate. The motion was opposed by the assignees, on the same grounds urged by them against the applications of Charles and Henri Domain for a certificate, having reference to the irregularities apparent on the face of the Bankrupt's book and pointed out by them to Maurel and his accountant. After a minute reference to the books, neither the Bankrupt nor his accountant could account satisfactorily for the irregularities to which their attention had been directed.

True it is that an attempt was made by Counsel, at the last hour, at a satisfactory explanation of the irregularities complained of.

When this could not be done the blame was immediately laid to the charge of the accountant who was to be made a scape goat the better to relieve the Bankrupt from the consequences of his own laches whether personal or through his agent whose doings were sanctioned and allowed by the Bankrupt whose bounden duty was to have checked the careless mode of book-keeping adopted by his accountant and continued up to the date of the bankruptcy.

Surely during all that long space he must have had frequent opportunities of referring to his books and could not help noticing the irregularities pointed out by the Assignees and might have put a stop to the evil pointed out.

In this as in the two cases of Charles and Henri Domain, and for the reasons fully set out in Charles Domain's case, I refuse the certificate and refuse any protection whatever.—With costs.

SUPREME COURT.

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SÉQUESTRE,—PROCÉDURE.

Lorsqu'une partie intéressée désire obtenir le changement d'un gardien Séquestre nommé par "Rule" de la Cour Suprême, elle devra produire un "Affidavit" des faits sur lesquels elle base sa demande, et assigner toutes les parties en cause dans le premier "Rule," à comparaître devant le Tribunal, pour voir ordonner qu'un "Rule Nisi" sera accordé par la Cour, fixant une audience à laquelle la question sera débattue.

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JUDICIAL SEQUESTRATOR,—NOTICE OF MOTION.—AFFIDAVIT,—RULE NISI.

When a party to a Rule appointing a Judicial Sequestrator wishes to have such sequestrator removed, he must give notice to all the parties to the first Rule, of his intention to move for a "Rule Nisi" to that effect, and set forth an affidavit of the facts on which he intends to ground his application.

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WIDOW DIORÉ,—Plaintiff,

versus

GALDEMAR FRÈRES AND ANOR.,—Defendants.

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Before;

His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL.

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E. PELLEREAU, —Of Counsel for Plaintiffs.
E. LAURENT, —Plaintiff's Attorney.
P. L. CHASTELLIER,—Of Counsel for Defendants
F. VICTOR, —Defendants' Attorney.

—

10*th November* 1869.

A Notice was served on the Defendants, intimating to them the intention of Plaintiff to move this Court, on the 11th October last or any other day when Counsel could be heard, for a Rule appointing another person in the room and stead of Galdemar frères, the Defendants, to carry out and execute a Judgment of the Supreme Court, of the 17th August now last past, between Plaintiff and Defendants, naming Galdemar frères Judicial Administrators of the sugar estate *Richfund*, the joint property of the Plaintiff and Defendants. The said Rule being asked and prayed for on account of the refusal, neglect, breaches and laches of the said Galdemar frères in the execution of and concerning the said Judgment, which said refusal, neglect, breaches and laches of the said Galdemar frères are fully mentioned and recited in three Notices served at the request of the Plaintiff on the Defendants, on the 22nd September and on the 11th and 13th October now last past; which the Plaintiff would bring into Court, which was done on the Motion day.

On E. PELLEREAU moving the Court for the Rule referred to in the notice of motion:

P. L. CHASTELLIER objected on behalf of Galdemar frères to the motion; he was supported in his opposition by L. ROUILLARD, of Counsel for Wilson.

The objection was to the form of the motion which, it was contended, was inconsistent with the Rules and practice of the Court.

In cases similar to the present, the Rule and practice was: 1o. To give notice of the motion intended to be made on the day mentioned in the notice, and 2o. upon an affidavit setting forth the grounds in support of the application to move the Court for a *Rule "Nisi"* in the first instance, returnable on any given day so as to put the Defendant in possession of the grievances complained of and of giving him the opportunity of ascertaining the nature of the demand made upon him and thus enabling him to prepare his defence, if any he have, to the application.

The Plaintiff should have adopted the Procedure traced out in form 10 of the Rules of Court, the same procedure resorted to by *Galdemar frères* v. *Dioré* & *ors.* for their appointment as judicial administrators of "*Richfund.*"

That Form is Form 10 entitled: "*Notice with summons before the Court, to shew cause why &a*; Whereas the Form followed by the Plaintiff in this case is that bearing No. 8 entitled: "*Notice of Motion.*"

2o. Again, the several parties to the Judgment appointing Galdemar frères Administrators of the Estate "*Richfund*" have not been called into Court, and yet they have or many have an interest in opposing the change prayed for, no Notice of Motion having been served on them.

E. PELLEREAU supported the form of the proceedings adopted by reference to Form 10 of the Rules of Court, which rules that "in all that class of cases which are not susceptible of commencement by Declaration and in which it was formely lawful, under the "Code of Procédure Civile," for one party to commence proceedings by giving to the adverse party, *de plano*, an "Assignation à comparaître devant le tribunal &c. pour voir ordonner &c." a party may, instead of the above notice (Form 8 Notice of Motion) use the following form No. 10, that is "Notice with Summons before the Court, to shew cause why" &tc.

He contended that the Motion for the removal of Galdemar frères from their administration was one of that class of cases not susceptible of commencement by Declaration, but in which the Plaintiff was entitled to give, *de plano*, to the adverse party (the Defendants) an "Assignation à comparaître devant le tribunal &c. pour voir ordonner" that they should be deprived of the administration confided to them by the Rule of

Court afore-mentioned for the several reasons brought to their knowledge by the several notices served upon the Defendants.

Form 10 says nothing of the Affidavit the absence of which, however, is more than compensated for by the fact of the notices served on Defendants, having specifically set forth the grievances complained of by the Plaintiff. Let it not, therefore, be said that the adoption of the form complained of is unfair to the Galdemar frères by depriving the latter of the possibility of shewing cause against this motion. The form adopted on this occasion is the same that was resorted to by the Galdemar frères when claiming the administration of *Richfund* against the now Plaintiff. And why should not the same form be followed by the Widow Dioré for the purposes of depriving the Defendants of their administration?

JUDGMENT.

It is not unimportant that suitors should enter this Court by the right door. If instead of a strict adherence to the Rules of practise and to the forms traced out by the Rules of Court for the guidance of practitioners, the latter were at liberty to lay aside the forms given, and to adopt others of their own framing, there would be an end to anything like certainty in the practice, confusion would be the immediate result from such a departure from the Rules of practice of this Court, to the great prejudice of suitors, and of a great hinderance to a safe and speedy administration of Justice.

But to return to the subject matter before us:

The Form adopted in this case, is not, as erroneously stated by E. Pellereau, the Form 10, but the form No 8, entitled "Notice of Motion" which should be set down on the Cause-Paper of this day on which the motion was to be made. This motion was not so put down.

"Notice of motion is sometimes given to the "opposite party, particularly where it is desired "that time and expense may be saved by affor- "ding the party an opportunity of showing cause "against it in the first instance." (*Chitty's Archb.* Pract. p. 1413)

However desirable it might have been that the Defendants should shew cause, in the first instance, yet it could hardly be expected that they should be in a position to do so, especially in presence of the numerous grievances set out in the Notices served upon them and of the importance of the issue before the Court which is neither more nor less than a side way of setting aside a Judgment of this Court, without a new-trial.

A Notice of motion is a mere intimation to an adverse party of an intended motion whether for a Rule "*Nisi*," or a Rule "*Absolute*," in the first instance.

"All Rules to set aside proceedings for irregularity or otherwise, are Rules "*Nisi*," *à fortiori* should they be so when not irregular proceedings but a formal Judgment is sought to be set aside."

"If, "*absolute*" in the "first instance, they "are obtained thus: Let an *Affidavit* be made "of the facts necessary to support the applica- "tion &c. If the Rule required be a Rule "*Nisi*" only, give the Motion-Paper with the "*Affidavit*, annexed, to Counsel &c. (*Chitty's "Archb*: Pract: p. 1411)"

Therefore, whether the Rule moved for be "*Nisi*" or "*Absolute*," in the first instance an affidavit must be made of the facts necessary to support the application and laid before the Court.

We have no such affidavit in support of the Plaintiff's motion, till the very close of this discussion.

The Rule and the practice of this Court, grounded on the Rules and practice of "Westminster" lead us to the conclusion that the Plaintiff is not "*recta in curia*" and therefore that she cannot and that she do take nothing by her motion.

We are the more confirmed in this conclusion by the fact of the Plaintiff not having called into Court some parties who might have an interest in upholding the Judgment sought to be set aside and who might have succeeded in doing so had they been afforded an opportunity of shewing cause against this motion.

Costs against Widow Dioré.

SUPREME COURT.

DIVORCE,—SÉVICES ET INJURES GRAVES,—IVROGNERIE.

DIVORCE,—SŒVITIA AND "INJURES GRAVES."—DRUNKENNESS.

L..... THE WIFE,—Plaintiff.

versus

L..... THE HUSBAND,—Defendant.

Before

His Honor THE CHIEF JUDGE, and
The Honorable G. B. COLIN.

Hon. V. NAZ, —Of Counsel for Plaintiff.
H. BERTIN, —Plaintiff's Attorney.
P. L. CHASTELLIER, —Of Counsel for Defendant.
V. LAVAL, —Defendant's Attorney.

25th November 1869.

This was a suit introduced before this Court by M.... N.... L....., the wife of J..... V.... L...., for a divorce *a vinculo matrimonii*.

The charges brought by the Plaintiff against her husband, extend over several years, and set forth a series of *sœvitia* which if made out would evidently show the Plaintiff's wedded life to have been miserable, indeed. At the root of all her sufferings, the Plaintiff had placed her husband's inveterate habits of intoxication that have so grown upon him and mastered all self-control, that he constantly threatens and strikes her, strikes her mother, and has been sentenced to be imprisoned for three months with hard labour, and to pay a fine, by the District Magistrate of Black River, on account of his great violence and the assault to which it led. His intemperance has also, it is alleged, brought about the ruin of himself and the whole family to such a degree, that the Plaintiff is often obliged to have recourse to her neighbour's charity for her children's bread.

The defence attempted to palliate the conduct of the Defendant and to attribute the cause of some part, at least, of the grievances suffered by the Plaintiff, to her mother's undue interference and meddling in the domestic concerns of husband and wife. The Defendant also denied having brought about the ruin of the family, and expressed himself anxious, if his wife would return to him, to atone for his past conduct.

We are of opinion that the only part of the Defendant's answer which we can sustain is that in which he repudiates the delapidation of his wife's fortune, the ruin of his mother-in-law. Sad as is the fact, and painful the apparent consequences of the fact, we do not find sufficient evidence to convince us that the Defendant has directly brought about the state of misery which seems to stare the family in the face. But we have sufficient evidence that he did nothing to support the family where every exertion on his part was called for; when he should have strained every nerve to sustain his tottering fortunes.

Instead of taking to work, he took to drink, and intemperance brought in its train; idleness, misery and degradation.

We believe, from the evidence before us, that the Defendant is a confirmed drunkard, not we trust past recovery and past atonement, but a drunkard who has already done enough, caused his wife to suffer enough to entitle her to the legal remedy she sues for.

His violence, when drunk, is left beyond any reasonable doubt; he slaps his wife's face, strikes her with his fist, attempts to strangle her, So says Mrs. Leguen, the Plaintiff's sister. By Arthemise Bonne Langue, he is seen to strike and kick his wife, then to rush upon his mother-in-law, push her against the wall, and attempt to strangle her, and that scene is not a solitary one; Nicolas Babilonne speaks of facts of the same nature. Inspector Brownrigg and Sergeant Gray, show that he was once sent for by the District Magistrate and warned not to begin again; he had been striking his wife and mother-in-law; the warning passed unheeded, and again he is brought up and sentenced to three months' imprisonment and to pay a fine of £10. Rivet, a neighbour, proves very clearly the destitution in which the children were left; he often had to give them food, and the Plaintiff has been obliged to sell jewells, furniture and clothes to feed her children.

His conduct to his children, themselves, was harsh; and to his frequent use of the horsewhip to strike them, and her interference on their behalf, the mother-in-law attributes the first cause of dissension between her son-in-law and herself.

Against the Plaintiff herself, not a word is said; the best feature of the Defendant's case is the avowal made by him that he has not a word to say against her chastity or her character.

But that avowal is not sufficient to defeat the Plaintiff's right, at best an afterthought, it cannot excuse the obloquy heaped upon her; the coarse, disgraceful language used towards one who born of respectable parentage, as the witnesses say, chaste and pure as she is confessed to be, striving to bring up her young children properly, notwithstanding the fatal exemple set up by their own father, must have had constantly her feelings outraged, her sense of decorum and of shame put to the severest trials. It is not sufficient to atone for acts of violence and brutality which drunkenness explains, whilst it does not excuse; it is not sufficient to lead us to hope that a life so dissolute will be amended upon a further trial of common life; drunkenness and idleness, brutality to others, and self-degradation, are found here together and are here found to have led to a state of misery, which, if the witnesses speak the truth, and we believe that they do speak the truth, is not often witnessed, It is possible that the mother-in-law may have interfered when she ought not to have interfered, but we find no evidence of such undue interference, it is only natural that that lady should have tried to avert from her grand-children's backs their father's horse-whip, and she, too, has suffered much and has suffered long.

We allow this prayer and grant a decree for a divorce *à vinculo*; we authorize this Plaintiff to repair within the legal delays, before the Officer of the Civil Status of the District, where the marriage bond was entered into in order that the divorce be pronounced by such Officer who is by this decree authorized to pronounce the same.

In the course of the argument, the custody of the children was alluded to. We find no formal motion to that effect; we, therefore, make no formal Order; but our Law, Art. 302, has provided generally for the custody of the children, unless a special Order be granted by the Court at the instance of the family or the "Ministère Public." It is still open to the family or to the "Ministère Public" to apply for a special Order, if they think it right; but we have heard no such application, yet.

Defendant shall pay the costs of this suit.

BAIL COURT.

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APPEL D'UN JUGEMENT DE LA COUR DE DISTRICT, CAUTION,—DÉLAI.

L'appel d'un Jugement de Cour de District doit être fait dans les cinq jours de la date du dit Jugement, et le Magistrat doit, "aussitôt" après que les raisons d'appel lui sont remises, soumettre l'Appelant à un cautionnement; mais l'appel n'est point nul si le cautionnement n'a pas été fourni et reçu dans les cinq jours du Jugement.

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APPEAL FROM A JUDGMENT OF DISTRICT COURT, —SECURITY,—DELAY.

Every person appealing from the Judgment of a District Court, must, within five days from the date of the Judgment, exclusively, give notice in writing of such intended appeal, to the District Magistrate, who shall "immediately" bind the party so giving such notice, with sufficient security. But such appeal is not annulled by the fact that such security was entered into on the day after the expiry of the five days.

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LALOUETTE,—Appellant,

versus

LAZARE,—Respondent.

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Before:

His Honor Mr. JUSTICE COLIN.

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A. LALOUETTE,—Of Counsel for himself.
J. U. HITIÉ, —Attorney for same.
E. J. LECLÉZIO,—Of Counsel for Respondent.
L. DESPERLES, —Respondent's Attorney.

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25th November 1869.

In this case which was an appeal from a Decision of the District Court of Grand Port, dated 27th April last, the Respondent, when the cause came on for hearing, took an objection against the admissibility of the appeal which, as he contended, had not been followed up in conformity with Section 61 of the District Court Ordinance, Civil side. The section runs thus:

"Every person so appealing, shall, within five "days from the date of the Judgment, exclusi- "vely, give notice in writing of such intended "appeal to the District Magistrate; upon which "Notice such Magistrate shall immediately bind "the party so giving such Notice, by recogni- "zance to Her Majesty, with sufficient security "of equal amount to the sum and costs awarded; "and the condition whereof shall be that such "party giving such notice of appeal, shall appear, "and within a fortnigth, prosecute such appeal "to its conclusion before the above named Su- "preme Court, and pay such costs as the said "Court may award on such appeal. The party "having so been bound by recognizance shall "lodge his appeal in the Registry of the said "Court, and give to the Respondent notice of "the appeal, within five days from the date of "the recognizance."

It was admitted by the Respondent that notice in writing had been given to the Magistrate, within five days from the date of the Judgment; but it was contended that the recognizance was entered into after the five days, to wit: on the day after the expiry of the five days, and that the words "upon which notice, such Magistrate "shall immediately bind the party so giving "such notice, by recognizance," was intended to bring the recognizance within the five days as well as the Notice in writing of the intended appeal.

The delay of five days is, by the section, expressly enacted for the Notice of appeal; it is not expressly extended to the recognizance; and as nullities of every description and perhaps more especially those which would bar the exercise of a right given by the statute, are *strictissimi juris*, I am, *prima facie*, of opinion that the appeal should not be estopped by the fact that the recognizance was given on the day immediately following the notice of appeal. The argument that the Ordinance enacts that the recognizance shall be immediately after taken, and that therefore the recognizance should be taken within the five days, would give to the statute a very harsh construction, construction not borne out by the legal sense of the word "immediately."

The Appellant has five days to give notice of appeal; he may, therefore, wait until the last portion of the time allowed to him to serve his notice of appeal. Shall the Magistrate be bound to sit beyond the usual Court hours to bind the Appellant by recognizance, or may he not wait until the next day? He would be bound to si on, if the word "immediately" had the meaning given to it by the Respondent, *i.e.*, at the very minute that follows. But it is settled that the word has no such meaning.

By the 43 Eliz. C. 6, Sect. 2. costs could not be awarded beyond the sum of the debt or damages recovered when the sum of the debt or damages did not amount to forty shillings; that statute was amended by the subsequent statute 3 and 4 Victoria C. 24. which allows, in certain cases, the Judge to certify certain matters, upon which certificate, costs would be allowed. The statute enacts: "unless the Judge or Presiding Officer shall immediately certify."

The strict meaning of the word "immediately" came under consideration of the Court, and it has been held that the certificate might be granted at or within a reasonable time after trial or enquiry. In fact, that the force of the word "immediately" was not to bind the Judge to certify as soon as the verdict was brought in, but gave him a certain reasonable latitude.

Thompson v. *Gibson* 8. M. and W. 281,
Page v. *Pearce* 8 M. and W. 677.

In the former case, BARON ALDERSON referred

to a Judgment of LORD CHANCELLOR HARDWICK, *Rex* v. *Francis* (cases Temp. Hardwicke 114) His Lordship,there, said : "It was said that the word " immediately " excluded all intermediate time and action, but it will be found that it has not, necessarily, so strict a signification."

The word " immediately " has almost the same force as the word " instanter " ; that term has been held to mean that the act shall be done within twenty-four hours.

CHITTY'S *practice of the Law* III. 82, quoting *Price* v. *Simpson*, 1. TAUNT 343.

In the same way, the term " forthwith " has been considered in *Nicholls v. Chambers* (I. Cr. M & W. 385) to import that the requisite act shall be performed as soon as, by reasonable exertion confined to that object, it might be.

We have just seen cases in which the word " immediately " was used and construed in the same manner, and this *Courtin Dowland v. Jeffreys*, construed it so, likewise.

In fact, just as the Judge who is to grant the certificate for costs, " immediately", may take a reasonable time to consider, the Magistrate who is to bind, immediately, may take a reasonable time to consider the value of the security tendered.

With respect to the Ordinance, there is this more to be said : if the legislature had intended the term of five days to cover, in every case, both the Notice of appeal which is mentioned in direct connection with the five days, and the recognizance which is not mentioned in direct connection with the five days, the legislature would have directly included both acts within the prescribed delay, and it has not.

We think, for I have taken the opinion of my brother Judges on this point of practice, and they agree with me, that, as a rule, the delay should not be allowed by the District Magistrate to go beyond the very first moment after the five days subsequent on Judgment, that he can bind the Appellant.

The objection to the admissibility of the appeal is overruled, with costs against the Respondent.

SUPREME COURT.

MANDANT ET MANDATAIRE,—MANDAT TACITE,—NEGOTIORUM GESTOR,—AGENCE D'UNE PROPRIÉTÉ SUCRIÈRE,—COMPTE-COURANT.

Le compte-courant ouvert par des commissionnaires à un planteur et continué, après la mort de ce dernier, avec la succession, ne peut lier que les héritiers qui ont personnellement contracté avec les commissionnaires. Celui qui a contracté n'est point, jusqu'à preuve du contraire, le mandataire tacite des autres co-héritiers qui peuvent réclamer la balance de compte-courant leur revenant à la date du décès de leur auteur.

PRINCIPAL AND AGENT,—TACIT POWER-OF-ATTORNEY,—NEGOTIORUM GESTOR,—AGENCY OF A SUGAR ESTATE,—ACCOUNT CURRENT.

An account current opened by agents in town to a Planter and continued after the death of the latter with his representatives, is binding upon such of the heirs only who have contracted personnally with the agents. Those who have so contracted are not, prima facie, *the tacit agents of the other co-heirs who are entitled to claim the amount of the balance of such account current accruing to them at the date of the opening of the succession.*

FÉLINE,—Plaintiff,

versus

F. GONNET, PLASSON & Co.—Defendants.

Before :

His Honor the CHIEF JUDGE.

Hon. E. J. LECLÉZIO,—Of Counsel for Plaintiff.
A. J. COLIN, —Attorney for same.
L. ROUILLARD, —Of Counsel for Defendants.
J. PIGNEGUY, —Attorney for same.

27*th November* 1869.

In this case, the Plaintiff Mr François Féline, in his capacity of heir of the late Pierre Féline his father, sued the Defendant for the payment of the sum of $490.44 being, as was alleged, the third part of the sum of $1,471.32, balance of an account current for the Estate " *Mon Rocher*," acknowledged by the Defendant to be due to the late Pierre Féline, on the 1st May 1861.

Judgment was asked by the Plaintiff, for the above sum, with interest at the rate of 6 per cent from the last mentioned date, with costs of suit.

In answer, the Defendants stated that the late Pierre Féline, the father of the Plaintiff, died on the 6th January 1861. He was the owner of the Estate " *Mon Rocher* " to which the Defendant had been in the habit of furnishing money and also the ordinary necessaries for carrying on the property, receiving in return the sugars and selling them in the market. That it is true that the account current between the parties, when closed on the 1st May 1861, did, as the Plaintiff alleged, shew a balance in favor of the Estate, of $1,471: 32 of which one third would be $490.44, but that the Plaintiff cannot be allowed to pick out the balance at a particular day when in his favor, for, afterwards, on the 5th July 1841, when the Plaintiff sold his share in the Estate to his brother Louis Féline, the balance had turned the other way to the extent of upwards of $1,700. That the Defendants had, *bonâ fide*, continued to make advances to the Estate after the death of Mr. Pierre Féline and the closing of the account above-mentioned. The property then belonged to his two sons Louis Féline, the Plaintiff François Féline, and a sister, Mrs Noble : That the Defendants considered that those heirs were responsible to them for those advances which benefited the Estate, Mr Louis Féline having acted for the Estate and represented the heirs after the

father's death, in his dealings with the Defendants, in connection with the Estate *Mon Rocher*. That a division in kind was effected between the heirs, on 18th March 1861, when the sons took the Immoveable Property and the sister had the other assets for her share: that on the 5th July, as already mentioned, François Féline sold his share to his brother Louis; the balance then appearing on the books of the Defendants was then upwards of $1,700 against the Estate. The Defendants contended that it was only from the date of the sale to Louis that the Plaintiff François could get quit of his liability for his share of the loss upon the property; that the account is not an account of the succession, but of the Estate, and it is so entered in the books of the Defendants.

THE COURT.

On looking at the business books of Messrs. Gonnet, Plasson & Co. we find the following entries relating to the Estate *Mon Rocher*.

The account stands in the Ledger, originally.

"*Mon Rocher*; P. Féline," and on the 8th March 1861, *i.e.* about two months after the death of the owner, the said Pierre Féline, and at the close of the sales of the sugars made by him, we have an entry closing and balancing the account current in the following terms:

"*Mon Rocher*. P. Féline. Arrêté le présent "compte courant par une balance de quatorze "cent soixante et onze piastres et 32 c. en faveur "de l'Etablissement *Mon Rocher*; valeur du 1er "Mai. Remis à Mr. L. Féline toutes les pieces "comptables relatives au dit compte courant.

"S. E. ou O.

"Port Louis, Le 8 Mai 1861.

"Approuvé

"pour l'etab. *Mon Rocher*,

"(Signed.) L. FÉLINE."

An account appears in the books in the same form down till October 1861, on the 16th of that month, it is carried to a new folio, and it is continued under the heading "*Mon Rocher*, Louis, Féline," whose name is thus substituted for his father's. We thus see that on the 8th May 1861, there was a balance of $1,411.32, and due by the Defendants, as per account rendered by them, of which one third *primâ facie*, at least, belonged to the Plaintiff as one of his three heirs. The account figures in the notarial inventory made after the death of Mr Pierre Féline, as bringing out "in favor of the succession," the above-mentioned sum. This account emanating from the Defendants themselves, is the Plaintiff's title, and to resist successfully the demand based upon such a document, it is necessary that the Defendants should be able to allege something in fact or law, relevant to set aside that title. What do they allege? They say that after the death of the father, Pierre Féline, and the striking of the balance, when all the sugars of the crop were disposed of they went on making advances to the Estate, as before; that they dealt with Louis Féline the son, as representing the family, and that as the balance, afterwards, turned against the Estate, and in the Defendant's favor, they cannot be held bound by the state of the account as it stood admittedly at the beginning of May 1861, which would just be to allow the Plaintiff to pick out, at a particular moment, the balance when it suited his purposes.

There is no reason to doubt that the Defendants were in good faith when they continued to make advances to this Sugar Estate, after the death of their constituent Pierre Féline and their giving in the account as closed and balanced on 8th May 1861; but, to bind the present Plaintiff who is one of the heirs and representatives of the late owner, they must shew that he is obliged, in law, to homologate those advances which, in other words, would come to this that he must take the state of the account at a subsequent time when it will suit their views and interests, *i.e.* when the balance is in their favor. But on what principle of law can the Plaintiff be so bound?

The Defendants alleged that they dealt with Louis Féline, the only one of the heirs with whom it is shewn that they came in contact as representing the family after the father's death. This is quite possible, but what authority had they for so dealing with one of the family as the general representative of all its members? It will be observed that Louis Féline settles the accounts and recives all the vouchers for the Estate.

This statement that he was acting "for the Estate" conveys no clear and definite meaning as to what persons he was acting for. How, then, can his acts be binding upon the other heirs unless authority to act on their behalf can be produced? But there is nothing of the kind put forward by the Defendants. It has not been shewn, in evidence, that the Plaintiff even knew of those advances, far less sanctioned them or authorized them to be made on his account.

The demand of the Plaintiff, founded upon the admission of the Defendants, of an existing balance when the last of the sugars of the particular crop were sold, has not been met by any plea effectual in law to elide the demand.

To the arrangements of the heirs among themselves in the way of partition of the property left by their father, and the sale of his share of the Estate "*Mon Rocher*" by one of the brothers to the other, the Defendants were no parties, and they can have but a slender bearing upon the present question. The Defendants admit that after the Plaintiff parted with his share of the Estate to his brother, the Plaintiff can no longer be held liable for any part of the advances made by them to the Estate; but the result of their argument would come to this that while they refuse to allow the Plaintiff to stand upon the closed account as rendered by themselves on the 8th May 1861, they would take the balance when favorable to them on 5th July thereafter, and make him liable for his share of a balance, no proof being produced that he ever authorized advances to be made on his account.

I think the position of the Plaintiff is good in law, and therefore Judgment will issue in his favor in terms of his demand, with costs.

SUPREME COURT.

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ERREUR DE DROIT, —NULLITÉ.

L'erreur de droit, comme l'erreur de fait, annulle la convention lorsqu'elle en a été la cause principale et déterminante. Dans le doute il n'y a pas de nullité.

Circonstances d'après lesquelles la Cour a décidé que l'époux marié en séparation de biens, qui avait acheté des immeubles en son nom seul, depuis la célébration du mariage, et les avait revendus depuis, conjointement avec sa femme, à un tiers (un fidei commis) *qui plus tard en avait repassé vente aux deux époux, ne pouvait réclamer la rectification de ces actes en se basant sur l'erreur de droit qui lui avait fait vendre et racheter conjointement avec sa femme des immeubles qui n'appartenaient qu'à lui seul.*

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ERROR IN LAW,—NULLITY.

Errors in law as errors of fact annul a contract when such error is the principal cause and is the very essence of the contract. When there is a doubt to that effect, there is no nullity.

Circumstances under which the Court had ruled that a husband married under the mode of the separation of property, who had purchased immoveable properties after the celebration of his marriage and afterwards had sold the same, jointly with his wife, to an otherp arty (a fiduciary) who afterwards sold back the same to the two spouses, had no right to claim the modification of such deeds, on the ground that by an error in law, he had sold and purchased jointly with his wife immoveable properties which were his personal property.

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RAMPAL,—Plaintiff,

versus

BOUR AND WIFE AND ANOR,—Defendants.

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Before :

His Honor Mr. JUSTICE BESTEL and
His Honor Mr. JUSTICE COLIN.

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Hon. E. J. LECLÉZIO,—Of Counsel for Plaintiff.
E. LECLÉZIO, —Plaintiff's Attorney.
L. ROUILLARD, —Of Counsel for Defendants.
E. DUCRAY, —Defendants' Attorney.

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25th November 1869.

The Plaintiff brought this action against two of his children, the issue of his marriage with the late Deidamie Mamet, to the effect of claiming from this Court a decree declaring that five houses situate in this Town of Port Louis, and apparently the joint-property of the Plaintiff and the Plaintiff's children by Marie Deidamie Mamet, aforesaid, belong to the Plaintiff, alone, and for no part or portion to the Defendants, and ordering the Defendants to proceed before Mr Gimel, Notary, and sign a notarial deed already prepared, and declaring, as aforesaid, that the said five houses are the Plaintiff's exclusive property. The prayer went on to ask that, should the Defendants be ordered to sign the deed aforesaid and neglect to do so," an office copy of the Judgment of the Court to be delivered in the matter should be annexed to the notarial document aforesaid and such annexion be deemed to be the equivalent of their having signed the said notarial document.

The Declaration which ushered into Court this prayer, after reciting the divers original deeds of purchase by the Plaintiff, of the five houses in question, set forth that François Rampal was united in marriage to Marie Deidamie Mamet and the marriage contract was drawn up by Déroullède, late a Notary public, on 25th July 1835 and stipulated a separation as to property. That the Plaintiff during his said marriage did sell the houses in question to Eugène Théveux the wife of Antoine Mamet, on 5th August 1844, that in the said deed of sale, through an evident error, the sale aforesaid was made by the said François Rampal, the Plaintiff, and the said Marie Deidamie Mamet, the wife separated as to property from François Rampal, although the said Mrs Rampal had no right whatsoever to the ownership of the said property and could not sell the same.

That by a written declaration bearing the same date as the notarial deed first described *i. e.*, 5th August 1844, the said Mrs Antoine Mamet duly authorized by her husband, bound herself to re-assign and make over again the said real property to Rampal, the Plaintiff, and his said wife, when required, the said Mrs Antoine Mamet averring that the sale aforesaid was not a serious one.

That Marie Deidamie Mamet, the Plaintiff's wife aforesaid, died on September 15th 1846.

That an inventory after death was then made, which said inventory does not mention the real properties aforesaid as forming part of the succession of the late Mrs Rampal.

That on the 26th February 1852, Mrs Antoine Mamet reassigned the real property in question to François Rampal, again through error, in his own personal name and as legal guardian of his five minors children the issue of his marriage with his late wife Marie Deidamie Mamet. That Rampal the Plaintiff has obtained from some of his children a declaration to the effect that they lay no claim to the property, and it is that declaration which the Defendants refusing to sign, the Plaintiff wishes to have decreed to be binding upon them.

The Defendants pleaded, in subetance, that they altogether denied the averments set forth in the Declaration.

That no error was committed by the Plaintiff as wrongly alleged by him.

That the Plaintiff knew perfectly well what he was about when he accepted from Antoine Mamet the wife a declaration or " contre-lettre " signed by her with the authorization of her husband, to the effect that the sale to her was fictitious and binding herself to retrocede the same and convey them back to the Plaintiffs and his wife. 4o. That the Plaintiff knew well what he was about when he assented to and signed in his own name and as legal guardian of his minor children (their mother being then dead) a notarial deed by which the said Mrs Antoine Mamet retroceded, conveyed and handed over to the said Plaintiff in both his alleged capacities the 5 houses in question.

5o. That if the 5 houses in question did not figure in the inventory as part of the Estate of the late Mrs Rampal, the Defendants' mother, it was the Plaintiff's own fault, for he was acting as legal guardian in the name of his minor children and cannot now avail himself of his breach of duties against his wards.

JUDGMENT.

The Plaintiff's object in this case is, right or wrong, to obtain from this Court a decree altering the tenor of a series of deeds which if they stand as they are, show that his children, the issue of his marriage with the late Marie Deidamie Mamet are, as representatives of their deceased mother, joint proprietors with himself, the Plaintiff, of five houses situate in this town of Port Louis. The Plaintiff would oust his children out of their rights of joint-ownership, alledging that the deeds in question were made under the influence of an error in law, and that he, the Plaintiff, should be sole owner of the said real property.

The deeds are all signed by the Plaintiff and are, *à priori*, conclusive evidence that he is not the sole owner of the five houses, but only joint-owner for one half, the other half being his children's property.

Errors in law differ from errors of fact, and there are cases in which our law distinctly precludes all possibility of curing an error in law; for instance, Art. 1356 enacts that : " l'aveu de la personne ne peut être revoqué sous prétexte d'erreur de droit, mais seulement pour erreur de fait." Again Art. 2052 enacts that " la transaction ne peut être attaquée pour cause d'erreur de droit. " But these are exceptional cases, and this general rule seems to be well settled that there is no essential distinction between errors of fact and errors of law when a remedy is sought, and a remedy is still legally possible.

As the basis of all contracts is the " in idem placitum consensus, " it follows that the article 1109 adopted that other rule of the civil law "nulla voluntas errantis est, " and save in the exceptions which it enacts, our Codes draw no distinction between errors in fact and and errors in Law.

On the other hand, it is not every error either of fact or of law which will tend to vitiate or impair the full force of a contract, the error must be in the very essence of the contract, the keystone of the arch ; otherwise many contracts of the most legitimate nature and binding force would be jeopardized, and the law is not less true, that " falsa demonstratio non nocet " when enough appears to show the intention, after the false description is rejected or rectified.

In realty, error must be the principal cause, we might even say the sole cause, which led to the contract in order to upset the contract. If a party may have been determined by some other cause, by liberalty, for instance, by a moral or a natural obligation, the contract will not be set aside because another apparent cause may turn out to have been a mistaken one in fact or in law. The authorities are very clear in drawing the distinction, and it is a just one. TOULLIER VI No. 68—DURANTON X p. 129; and LAROMBIERE whose work was relied upon to sustain the doctrine that errors in law as well as errors in fact might lead to the annullation of a contract, expreses himself distinctly.

Art. 1,110 par. 24 : " Mais l'erreur de droit, doit être, aussi bien que l'erreur de fait, un fait certain et la cause déterminante du contrat. Dans le doute il n'y a pas nullité, " in dubio nocet error erranti." The decisions of the Courts lay down the same doctrine, inter alia Toulouse, in Re *Genieys* v *Genieys* 24 Janvier 1824—S.V.ch : 7. 2. 298—Ct. Riom, in re *Alles*, 13th March 1855,—DALLOZ ; 55.2.183.—Grenoble in re *Tabouréche* v *Buée*.—S. V. 30. 2. 474 } 24 Juillet
„ 31. 2. 95, } 1830.

In this cause the Plaintiff states that he was married under the " régime " of separation of property and that it was through his mistaking the law that his wife joined him in the conveyance tohis mother in law Mrs Antoine Mamet.

For reasons which are left destitute of all explanation, he had put, through a fictitious sale, his real property under his mother in law's name. It was only many years afterwards that the property was reconveyed by Mrs Antoine Mamet in the same manner as it had been conveyed to her.

We do not want to inquire into the motives which actuated the Plaintiff, they may have been perfectly legitimate ; Art : 1321. C. C. allows, as between the parties themselves, the existence and legal force of " contre-lettres ; " but there stands the fact, and it is not from that fact, assuredly, that we can receive an impression that he was mistaken in law. That he purchased the property, alone, that when he sold it, his wife sold jointly with himself, may certainly have been due to an error in law. But it may have been due to many other causes which we may at once say, seem to us a great deal more probable, more natural and more legitimate than the one alleged, and alleged for the practical purpose of depriving the Defendants, his children, of that which the Plaintiff has acknowledged, not in one deed, but in several deeds to be their's.

It may have been due to a liberality in favor of his wife ; when we look at the marriage contract, we find a clause, No 5, to the effect that " le futur époux ou ses héritiers seront tenus de rembourser à la future épouse on à ses héritiers le prix des Immeubles et le montant des capi-

taux appartenant à la future épouse, ou qui lui reviendrait pendant le mariage, si le remploi dûment accepté par la future épouse n'a pas été effectué."

It was therefore foreseen that the bride had to receive real property or money, which the bridegroom would have to account for; nothing is more likely than the fact that the wife was acknowledged to be joint-owner of the 5 houses was, if not a liberality, at least a just payment, or recompense for monies received for her by the husband. It may not have been the usual mode of accounting or the legal mode of making a "remploi," but it had a practical effect and shows clearly the intent and leaning of the Plaintiff's mind.

It must not be forgotten that, so long as his wife was alive, and could defend her own just rights, the Plaintiff remained silent, he starts his own alleged legal mistake long after her death, and she died leaving her children in a state of minority, legally protected by himself their father *Cur tamdin tacuit?*

We are weighing the circumstances of the case, perfectly satisfied that the legal error alleged, was not, if there was an error, the sole cause, was not even the principal cause on which the contract rested. But there is more, upon the hypothesis that it was the sole cause of the contract, the Plaintiff must satisfy us, that in reality there was an error, and an error on his part. We do not believe, in point of fact, that he was mistaken; we believe that when he put his property under his mother in law's name, he knew full well what he was about; that he knew full well what he was doing when he conveyed, along with his wife, and subsequently took the reconveyance in his name, and as guardian of the minors, heirs to their dead mother.

The deeds are full of averments that must have opened his eyes to the truth, if they had been sealed; it is there stated that he was separated as to property; suppose he had forgotten that it is there stated that he alone had bought the property, if his wife had no right to a share thereof, or if he did not mean a liberality, would not that circumstance, at once, have disclosed to his mind an anomalous state of thing? We do not believe, then, that the Plaintiff was mistaken at all. It was urged that in the inventory made of the Estate of his deceased wife, no mention is made of her share of the real property. The Defendants answer this conclusively; the real property could not be mentioned at all, it was still apparently the property of the mother in law; the re-conveyance had not yet been effected, and again the children were minors, the Plaintiff was their legal guardian. If the real property could have been mentioned and was not, it was his own laches, his own fault, and surely he cannot set up that conduct as an argument in favor of his present views. The Plaintiff urges that he brought this action not to deprive his children, but for the sake of one son he has, the issue of a first marriage. That son has long since arrived at the years of discretion, (his birth was declared on 18th Juue 1824) and he can act for himself now, if he have rights; or if he have none at present whenever his rights emerge. The Plaintiff, himself, has a legal interest; if he is right, he wants no such reason; but the reason given brings no conviction to our minds.

It becomes unnecessary to examine the point suggested by the Defendants that the Plaintiff has ratified any error under which he acted, if error there has been; it is also unnecessary to examine the consent given by two of the Plaintiff's children, and whatever reasons led to that consent; that consent leaves the Defendant's case on its own merits, neither aided nor shaken by it.

We dismiss the Plaintiff's actions, and we dismiss it with costs.

SUPREME COURT.

SAISIE DE MEUBLES,—DEMANDE EN DISTRACTION, — TITRES ENREGISTRÉS,— PREUVE TESTIMONIALE.

Circonstances en vertu desquelles la Cour a décidé que la demande en distraction de certains meubles saisis en la possession d'un débiteur, ne pouvait être admise, bien que par un sous-seing privé enregistré plusieurs mois avant la saisie, ce débiteur avait vendu au réclamant les meubles objet de la contestation.

SEIZURE OF MOVEABLE PROPERTY,—INTERPLEADER, — REGISTERED TITLE DEEDS, — ORAL PROOF.

Circumstances under which the Court has refused to admit a claim made by way of interpleader to certain moveable property seized whilst in the possession of a debtor, although such claim was grounded on a deed of sale duly registered several months before the seizure.

CAMOIN AND JULIEN,—Interpleader claimants.

In Re:

CHARLES VIEAU,—Plaintiff,

versus

ANDRÉ ALCIDE, — Defendant.

Before:

His Honor the CHIEF JUDGE.

E. PELLEREAU, —Of Counsel for the Interpleader claimants.
A. BÉTUEL, —Attorney for same.

P. L. CHASTELLIER,—Of Counsel for Vieau.
J. G. TESSIER, —Attorney for same.

E. Barbe, —Of Counsel for A. Alcide.
V. Laval, —Attorney for same.

G. Guibert, —Of Counsel for Assignees of A. Alcide.
J. Guibert, —Attorney for same.

—

1st *December* 1869.

On the 18th September last, by order of the Judge sitting at Chambers, Charles Vieau, of New Little Mountain street, Port-Louis, proprietor, was allowed, on affidavit, to seize provisionally to the amount of $2,405, the goods and chattels of his debtor André Alcide, Livery Stable-keeper, Church street, Port Louis.

On the 27th September thereafter, Pierre Camoin, of Bourbon street, Port Louis, Attorney's Clerk and proprietor, and Aristide Julien, of Church street, Port Louis, Blacksmith and proprietor, gave notice that they objected to the said provisional seizure, on the ground that they had purchased certain of the said articles from André Alcide, by a deed of sale dated 14th December of last year and registered on the 23rd February following. In the said Notice the articles so claimed to be freed from the seizure were enumerated as follows: 1o. A four wheeled carriage by Erswell; 2o. A 4-wheeled carriage by Jones; 3o. A French 4-wheeled carriage; 4o. Two hearses complete; 5o. A green coach; 6o. Another coach (coupé); 7o. A carriage by Erswell with 6 seats; 8o. A bay horse; 9o. An Australian horse; 10o. An Australian bay horse; 11o. A grey Cape cob; 12o. A Cape horse (café au lait); 13o. An Australian grey horse; 14o. Two sets of double harness.

There being, thus, a double claim of property to the said moveable effects, parties were brought before the Supreme Court as in an Interpleader, and they agreed that the trial should take place before the Chief Judge alone, whose Judgment should be held to dispose of the matters in dispute.

Evidence at considerable length was adduced on both sides, and the following Judgment embodies the leading facts and arguments of the parties.

Sir C. F. Shand, C. J.:

Mr. Charles Vieau, of Port Louis, being a creditor of Mr. André Alcide, stable-keeper there, executed, in virtue of a Judge's Order, a seizure, on the 18th September last, of, *inter alia*, certain carriages, hearses, horses, and harness, as being the property of his said debtor and found in his possession. On the 27th September thereafter, two other persons, Mr. Pierre Camoën, an Attorney's clerk, and Mr. Aristide Julien, blacksmith, Port Louis, appeared in the field and objected to the seizure, alleging themselves to be the true owners of the said moveables. An issue of property in the Article in question is thus directly raised, and that issue must, necessarily, be determined upon the evidence which has been submitted to the Court.

In the course of the argument, it was pressed by the Counsel for the claimants, that the statements made by Alcide ought not to be allowed to weigh against them. I put it to the Counsel for the different parties, whether, looking at the position of the various persons interested in the present discussion, the case had not better been disposed of irrespective of any statements which Alcide may have made to the witnesses. This was agreed to, and accordingly I have set aside his statements on both sides, *i. e.* whether they appeared to weigh in favor or against the claimant's case. There is an other point to which I shall, here, advert: one of the witnesses deposed to facts adverse to the claimants. But he admitted that certain disputes had long existed between his family and some persons to whom one of the claimants is nearly allied. Without, in the least, impeaching the veracity of this witness, it appears to me that it will be better to deal with the case on the other evidence, leaving aside what this witness had stated.

In considering the testimony of the other witnesses, I have weighed carefully whatever appeared to affect their credibility.

The claimants, in the Interpleader, Messrs. Camoin and Julien, stand as Plaintiffs in such an inquiry. They allege that they acquired, by a true and *bonâ fide* sale, on 14th December 1868, the property and possession of the moveables in dispute, and in support of their pretensions they have adduced the following documentary evidence:

A deed of sale (*sous-seing-privé*) dated 14th December 1868 and subscribed by André Alcide, alone, acknowledging that he had sold and delivered to the claimants the articles which are now in dispute, as they then formed part of his Establishment in Church street, and in more or less need of repair. The writing bears that the seller did not grant warranty; the price was stated at $1,200, half of which was ready money; and for receipt of this sum of $600 a discharge was given in the said deed of sale. It was further declared that as to the remainder of the price, it should be due in equal sums of $200 each, for the payment of which the purchasers had subscribed, jointly and severally, 3 bills for $200 each, "à ordre," falling due on 1st January, 1st July and 1st March then next, and which bills had, on the day of the sale, been handed to the seller. The deed of sale farther bore that it was agreed between the parties that the whole of the articles so sold should be put up (remises) in Alcide's establishment "où travaille, d'ailleurs, l'un des acquéreurs," and the purchasers agreed to pay a monthly rent of $35 demandable every month. This deed was registered, on the 23rd February 1869.

Three bills were produced dated 14th December 1868 of $200 each, drawn by Camoin and Julien. The first, payable on 1st January 1869, bore to have been *acquit en Capital et intérêts* by Alcide, on the 28th August and registered on the 11th October last. The second, payable on the 1st February, bore to have been "*acquit*" by him "*en Capital et intérêts*," also

on 28th August and registered on the 11th October, while the third, payable on 1st March 1869, bore to have been "*acquit en capital et Intérêts*" by Alcide, likewise on the 28th August 1869 and registered on the 11th October thereafter. Two receipts for rent were produced by the claimants, the first for £70 for putting up their carriages and horses from the 14th December 1868 (date of the deed of sale) to the 14th February 1869; the second, dated 15th September 1869 for £265 for the period from 14th February to 14th September 1869. The first of those receipts was registered on the 11th, the second on the 13th October 1869. A receipt for £10, dated 30th June 1869, was produced. It bore to be given by a veterinery Surgeon to Mr Camoin, for an operation performed upon an Australian horse.

Such is the documentary proof on which the claimants rely; let us now see to what extent they have been able to supplement it by parole evidence.

They have shewn, by the testimony of persons of respectability who lived near the premises in church street or had occasion to be there frequently, that the articles now in dispute were seen constantly at the Livery Stables in question, which are of large extent; that Camoin was often on the spot giving orders; that Julien worked at his business of a blacksmith there; that the witnesses believed that the articles belonged to Camoin or to both claimants; that some of them had seen the deed of sale now produced by Camoin and Julien; that the claimant Camoin was in possession of some funds; that Camoin, in August last, some 2 or 3 months previously, enquired for permises suitable for keeping horses and carriages; that he had got some repairs executed on the carriages, and, on another occasion, has asked workmen to make some repairs on 2 of the carriages and on one of the hearses, but they could not agree upon the price; that in the opinion of the witnesses, the articles in dispute were generally known to belong to the claimants.

On the other hand, the nature of the opposing evidence will be gathered from the following summary:—Alcide is the only tenant of the premises under the Landlord; the Sign Board bears "André Alcide, Livery-stable keeper" or "Messageries Coloniales"; Alcide, alone, pays the license to Government; the claimants took out no license; the name of Alcide appeared in the regulations placed inside of all the carriages; the coachman in the establishment knew no other Master or Owner than Alcide who engaged them and paid their wages. They took their orders only from him or his wife or son, and never from the claimants. Alcide gave out the food for the horses, and when short of money, he went to the Place and drew the fares which the drivers had earned. The articles claimed were not separated from the others in the establishment, they were all worked and used together; there was no difference in any respect after the date of the alleged sale to the claimants, in December last; the coach drivers, at the end of the day, paid over the fares to Alcide, whose son kept the whole establishment. The carriages were known by the Municipal authorities, on the *Place*, as belonging to Alcide; he or his son exercised a *surveillance* over them when out on the streets, for hire. Camoin used to keep a carriage in the establishment and was in the habit of asking one of the servants to put in his horses, paying him a small gratuity for his trouble. Julien works in the yard as a Blacksmith, and repairs the carriages.

From what Camoin himself said upon interrogatories and the evidence of some of the witnesses, there appears no reason to doubt that he was possessed of some means. He seems to have a fancy for horses. He owned a race horse and ran it in his own name, both at the race meeting of 1868 and that of 1869. He states that he kept his money in a press and never deposited it in a Bank, because he was afraid of failures. The statements of various witnesses of standing, concur in shewing that the public generally and such persons as had occasion to go to the livery stables on business, always considered and dealt with André Alcide as the real and sole owner of the whole establishment.

Such being the somewhat conflicting evidence with which we have to deal, we must, now, proceed to sum it up with the view of arriving at such conclusion as it may appear to the Court to warrant.

One thing is, on all sides, conceded, viz: that André Alcide was originally the owner of the articles in question which formed a portion of the "*matériel*" of his livery establishment in Church street. The claimants undertake to shew that he ceased to be the owner of those moveables on 14th December 1868, by a *bonâ fide* sale to them. This they must establish in evidence; otherwise the articles being the property of Alcide, must form, by law, the pledge of his creditors, and would fall under the provisional seizure of Vieau. The claimants must prove a full, out and out and complete sale to them. They will not, according to the rules of the Code Civil, require to prove a subsequent and actual delivery, for it is enough, according to that law, if the parties were quite at one as to the subject, the price, and had given their full and final consent; but the want of a real, positive, distinct and visible transfer of the moveables from the seller to the buyer, will always be a prominent feature in any argument directed against the *bonâ fides* and completeness of the alleged contract.

Now, looking at the whole evidence, *hinc inde*, documentary and parole, which has been laid before the Court, have the claimants proved such a thorough *bonâ fide* completed sale as the law requires to divest the owner of his property and carry it off from his creditors? Unquestionably there are grave difficulties in the way of the claimants, here. The documents they produce, with slender exceptions, are entirely between themselves and Alcide, no third party appears in them whose presence could have assisted us in ascertaining the real nature of the transaction.

One of the two documents in which the name of a third party does occur is the receipt by the Veterinery Doctor for £10, the price of an oper

tion upon an Australian horse for Camoin, on 15th June last; but we have seen that he had to do with other horses, and no proof was led positively to connect the receipt with one of the horses in this Interpleader. The other production by the claimants, in which the name of a third party occurs, is only a receipt by a member of the legal profession acting for Alcide, for the first two months of the rent of the "remisage" of the carriages and horses.

This can go but a very short way to prove the real nature and quality of the transaction between Alcide and the claimants.

The whole case of the claimants has a singular and remarkable air: One of them is a lawyer's clerk, the other is a blacksmith. According to their statement they formed a sort of partnership for carrying on a livery Stable. They bought the carriages, horses &a., in question, from a livery stable-keeper with whom they agreed to allow the articles to remain in his premises and to be worked for their behoof. It is certainly a very extraordinary thing for a tradesman to allow a rival business to be carried on in such close proximity with his own; and the little evidence, to shew that other premises were looked for, applies to a period much after the alleged sale. Then, except to some of their own acquaintances, the sale remained quite a secret. Every thing in the yard, on the Place and in the streets, went on as before. Alcide's name alone remained in the Government license, over the entrance to the premises and in the inside of the carriages. He continued in the eyes of the public, of the Municipality and the drivers of the carriages, as the sole owner of the whole Establishment. There is another difficulty in the way of the claimants. Where did the money come from, which, according to their case, they paid to Alcide? As to Julien, a witness who knew him well states that he is a good workman as a farrier, but he never knew him to have any means. No doubt other persons may accumulate funds in this trade, but it was not proved that he had done so. Indeed it is remarkable that there is very little evidence to support the position of this claimant at all, and the witness just referred to tells us that Julien's demeanor in the Establishment was certainly not that of the owner.

The statement by several of the earlier witnesses, that the claimants were in apparent possession of the yard, or at least of part of it, made an impression on the Court, but is was subsequently shewn that one of the claimants, Camoin, put up his carriage there daily and had also a race horse at livery in the Establishment; and the other, Julien, had his workshop on the premises. Their presence on the spot was thus accounted for *aliunde*, and the fact, necessarily, came to be of much less significance.

As to Camoin being possessed of funds, the case is somewhat different from that of Julien; he, Camoin, appears to have been in possession of some money, and he was owner of a race horse; but his statement is a singular one. He tells us that he kept his money locked up in an "*armoire*," *without investment, for fear of bankruptcies.* He allowed interest at the rate of 12 per cent to run upon the instalments of the price of the purchase from Alcide. The three bills for $200 each, payable respectively the 1st of January, February and Mach 1869, are endorsed as paid, with interest only on the 28th August 1869. The claimant's excuse for not paying more promptly, viz: that he expected the fares of the carriages would meet the balance due, is not at all a satisfactory one.

On the whole matter I am of opinion that the claimants have not made out their case.

It is impossible to separate the documentary from the parole evidence, even if the former were less exposed to criticism than it is. Looking at the matter in the light shed upon it by the proof taken as a whole, I do not think that the claimants have been able to establish such a final and completed contract of sale as can divest Alcide and his creditors, of the property in the moveables in question.

The claimants' demand is therefore dismissed with costs.

SUPREME COURT.

HYPOTHÈQUE, — RADIATION D'INSCRIPTION, — CÉDANT ET CESSIONNAIRE,—FRAIS.

Le propriétaire d'un Immeuble, qui veut faire rayer une inscription grevant cet immeuble, peut assigner en radiation le cédant aussi bien que le cessionnaire de la créance hypothécaire, quoique ce dernier ait pris inscription en renouvellement; alors surtout que le demandeur n'a point connaissance que la notification du transport a eu lieu.

MORTGAGE, — ERASURE OF INSCRIPTION, — ASSIGNOR AND ASSIGNEE,—COSTS.

The owner of an Immoveable Property, who wishes to obtain the erasure of an Inscription of Mortgage burdening such property, may summon the assignor as well as the assignee of the mortgage claim, although the later has taken an inscription in renewal of the first one; especially when the claimant has no judicial knowledge that the transfer of such claim has been notified to the debtor.

CAZELIN,— Plaintiff

versus

LEBRASSE, — Defendant

Before:

His Honor the CHIEF JUDGE and
His Honor Mr. JUSTICE BESTEL.

E. PELLEREAU, —Of Counsel for Plaintiff.
A. ASTRUC, —Plaintiff's Attorney.
P. L. CHASTELLIER,—Of Counsel for Defendant.
J. U. HITIÉ, —Defendant's Attorney.

10th December 1869.

This was an application made in the usual form at Chambers, for authority to erase an Inscription. The Defendant having made objections before the Judge at Chambers, the matter was referred to the Court. The facts were the following:

The Plaintiff, Henri Caselin, called the Defendant, Selmour Lebrasse, to shew cause, why an inscription enrolled in favor of the latter on 15th September 1864, should not be erased from the Registers of the Mortgage Office.

The grounds for the application were thus set forth. "Inasmuch as the said inscription bur- "dening a plot of ground admeasuring eight "acres and fifteen perches, situate in the Discrict "of Flacq, at the place called "Les Trois Ilots," "bounded on the north by Fanchin Pignolet, on "thirty one perches and three feet; on the "south by Ernest Cazelin, on thirty one perches "and three feet, and on the west by the said "Pignolet on twenty six perches and three feet, is "null and void for the following reasons:"

"1o. Because this Inscription taken against "the real estate of Ernest Moreau personally, "the debtor of the said Selmour Lebrasse, cannot "burden the lots of the co-partageants of the "said Ernest Moreau."

"2o. And because a partition in kind of a plot "of ground of the extent of forty acres and se- "venty five perches from which was extracted the "plot of ground aforesaid, now the exclusive pro- "perty of the Plaintiff, has taken place between "the said Ernest Moreau and his copartageants "conformably to Law."

"Costs to be costs of erasure."

The Plaintiff thus stated that the Inscription as it stood on record, covered the whole subjects: that he was now sole owner of the portion of those subjects which had fallen to him on division. He farther set forth that as he wished to dispose of his property, it was absolutely necessary to give the purchaser a clear title, which could not be done while the Inscription in question remained in the Registers, unerased.

The Defendant answered that he had sold his interest in the Estate to the late Mr Jules Chauvin, by a notarial deed on the 4th April 1866, that the Inscription in question was renewed in favor of the said Chauvin, on the 7th April thereafter: that the Inscription of 1864 was therefore effaced by the later one, that the Plaintiff had called for the erasure of the wrong Inscription, that the Plaintiff had an opportunity, from the Public Records, of seeing exactly how the matter stood, that he had neglected to avail himself of the information to be thence gathered, and that accordingly the Defendant was entiled to go out of the case, with his costs, and his Counsel so moved.

To this the Plaintiff replied that even on the assumption that the Defendant's statements were well founded, Lebrasse was not legally divested by his cession to Chauvin, no proper or legal notice having been given to the debtor; that therefore the Plaintiff was entitled to have Lebrase's Inscription removed from the Registers of Mortgages. In England such rights, *choses in action*, could not be assigned at all and in France, and in our system, tho' the law was not so rigid, yet unless due and proper notice had been given of the transfer, the cession was not effectual, so far as third parties were concerned, to transfer the right from the "cédant" to the assignee. C. C. 1690, MARCADÉ, *ad locum*. TROPLONG, VENTE, No. 884.

The Defendant. on the other hand, contended that the notice of cession was merely required to protect the debtor, who till notice, was entitled to pay the amount to the original creditor. SIREY, *Codes annotés*. ART. 1690, NOS. 70—65 AND SEQ.

THE COURT.

It has often been a question to what extent notice for a cession is required to be given to the debtor, even for the validity of the cession itself, as divesting the "cedant," and not merely for the purpose of putting the debtor in *mala fide* to pay to any other party.

The text of the law declares: "Le cessionnaire "n'est saisi à l'égard des tiers que par la signifi- "cation du transport faite au débiteur: néan- "moins le cessionnaire peut-être également saisi "par l'acceptation du transport fait par le dé- "biteur, dans un acte authentique."

On this subject MARCADÉ writes as follows AD, ARTICLE 689 C. C. and following articles: "Entre le cédant et le cessionnaire, c'est-à- "dire entre le vendeur et l'acheteur, la trans- "mission de la propriété d'une créance s'o- "père par le seul consentement, et la déli- "vrance se réalise par la remise du titre; "mais relativement aux tiers, le cessionnaire "n'acquiert la propriété que par la signification "faite au débiteur, de l'acte de transport, ou par "l'acceptation du transport par ce débiteur. Peu "importe pour la signification qu'elle soit faite "par le cessionnaire ou par le cédant. Quant à "à l'acceptation, on conçoit qu'elle serait par- "faitement valable contre le débiteur, quoiqu'- "elle n'eût lieu que par acte sous-seing privé ou "même verbalement; mais vis-à-vis de toute au- "tre personne. elle n'est efficace qu'autant qu'elle "est faite par acte authentique."

So, TROPLONG, VENTE AD. ART. 1691 C. C. "Ainsi donc tant qu'il n'y a pas eu de significa- "tions, le cedant est censé saisi à l'égard des tiers "et le cessionnaire n'a rien à prétendre sur la "créance dont la propriété repose, en ce qui con- "cerne ceux ci, sur la tête du vendeur."

The Plaintiff might therefore in the absence of notice to the debtor in the creance, have reasonably entertained doubts as to the Cession having been completed to the effect of demanding Lebrasse altogether and vesting fully the debt in the person of Chauvin under the renewed inscription of 1866. But it is not necessary to go into the enquiry of the value of such doubts, because the

present discussion is now reduced to a question of costs. The Defendant says that as he has been called into Court erroneously, he should be put out of the cause, with costs. But taking the case even upon his own shewing, we must enquire at the outset if he really had any sufficient interest to make a formal opposition and appearance by Counsel in the cause? It is not at all evident to us that he had such an interest. He says he has no objection to the erasure of the inscription as asked by the Plaintiff. We think he might have said so at once, without coming into Court and discussing points of law.

We shall therefore order erasure of the inscription in question, costs to be costs of erasure, no costs in favor of Lebrasse.

SUPREME COURT.

HABEAS CORPUS,—COMPÉTENCE, — PROMULGATION A MAURICE DES STATUTS DU PARLEMENT DE LA GRANDE BRETAGNE.

Un Juge en Australie a qualité pour décerner un mandat d'arrêt contre un forçat condamné à la déportation dans cette Colonie, par une Cour de la Grande Bretagne, et qui est en rupture de ban à Maurice.

Bien que les lois locales ne soient promulguées à Maurice que par la publication qui en est faite en cette Ile, les Statuts du Parlement de la Grande Bretagne, concernant cette Colonie, y sont en vigueur sans y avoir été publiés.

HABEAS CORPUS,—JURISDICTION, — PROMULGATION IN MAURITIUS OF THE ACTS OF THE BRITISH PARLIAMENT.

A Judge in Australia has jurisdiction to issue a warrant of arrest against a prisoner of the Crown who was located in that Colony, on ticket of leave, and who, having escaped from the latter place, had repaired to this Island.

The Acts of the British Parliament are promulgated in Mauritius without having been published in the Colony, as the local laws.

IN THE MATTER OF

CON MORGAN AND MARTIN TAYLOR.

Before:

His Honor the CHIEF JUDGE and
His Honor Mr. JUSTICE BESTEL.

E. PELLEREAU, —Of Counsel for Applicants.
H. ACKROYD,—Attorney for same.

21*st December* 1869.

On a motion by E. PELLEREAU on behalf of one Con. Morgan and of one Martin Taylor for a writ of *Habeas Corpus* directed to John Nicolls Terence O'Brien, Inspector General of Police in the Island of Mauritius, directing him to bring before the Court the bodies of the said Con: Morgan, whose true name is alleged to be Edward Connor, and the said Martin Taylor whose true name is alleged to be Thomas Henderson, together with the cause of their imprisonment and detention and to order the return before it of whatever documents may be necessary to ascertain the cause of their detention and imprisonment, the Court ordered the said writ to issue returnable on Tuesday 14th December 1869, at noon.

On the day and at the hour appointed, the said Inspector General of Police produced into Court the body of the said Con. Morgan, alias Cornelius Morgan, alias Edward Connor, and the body of Martin Taylor, alias Martin Bowman, alias Thomas Henderson, and returned as the cause of the imprisonment and detention of the said Con. Morgan, alias Cornelius Morgan, alias Edward Connor and of the said Martin Taylor, alias Martin Bowman, alias Thomas Henderson, a warrant under date the 7th October 1869, directed to the Constable of Perth, and all other peace officers in the Colony of Western Australia delivered and signed by one E. W. Landor, Police Magistrate in and for the District of Perth, Western Australia, to apprehend the said Edward Connor, Reg. No. 7,373, late of Banbury, charged upon oath before the said Police Magistrate, for that he on the 24th February 1869, being a prisoner of the Crown, located in the District of Banbury, in the said Colony, on ticket-of-leave, did unlawfully depart from his appointed place of residence, to wit. the said District of Banbury, and another warrant of the same date directed as above, delivered by the same Police Magistrate of Perth, Western Australia, for the apprehension of Thomas Henderson, Reg. No. 4,168, late of Banbury, charged with a similar offence as above, which said warrants were severally indorsed by one of the Judges of Her Majesty's Supreme Court of Mauritius, and directed to him, the said Inspector General of Police for execution in the Island of Mauritius, by him or any Inspector of Police or Police Constables to be appointed by the said Inspector General of Police.

On the above return being made, E. PELLEREAU, of Counsel for the said prisoners, contended that the indorsement for execution of the said warrants was illegal, and therefore null and void, and moved for the immediate discharge of the said Edward Connor and Thomas Henderson, from imprisonment.

In his argument, Counsel referred first: to the act of 5th, GEO. 4. C. 84 SEC. 22 wherein it is enacted that the offender sentenced to transportation who shall be afterwards at large within any part of His Majesty's dominions without some lawful cause, before the expiration of the term of Transportation, shall suffer. death as in the case of felony, without benefit of clergy, and may be tried, either in the County or place

where he shall be apprehended, or in that part from whence he was ordered to be transported.

So much, however, of the above act as inflicts punishment of death for returning from transportation has been repealed by 4 & 5. WILLIAM IV, substituting for punishment of death, transportation for the offender's natural life, and previously to transportations imprisonment with or without labour, for any term not exceeding four years.

From that enactment of 5TH GEO 4. C. 84. SEC. 22, said E. PELLEREAU, it is evident that, assuming for the sake of argument that the parties charged are guilty of the felony enacted, that they are to be tried at Mauritius, being the place where they have been apprehended or in England, the part from which they were ordered to be transported, and that they were not to be sent back to Australia for trial, the Act conferring no jurisdiction on the Courts of Australia to try the offence with which the parties are charged.

The absence of jurisdistion becomes still more apparent from the fact that the offence with which the parties are charged could not have been committed as long as they continued in Australia; located in Banbury, where they had a right to move about as long as they continued within the space limited to them, they were no offenders.

It was by going beyond that limited space that they could commit the offence charged. Such removal from Banbury necessarily placed them beyond the jurisdiction of the Magistrate of Perth, who therefore was by the very offence committed deprived of the power of issuing the warrants now exhibited for their apprehension.

The warrant issued by him being null and void for want of jurisdiction, it necessarily followed that the execution of such illegal warrant on the illegal indorsation complained of is also null and void, whence the necessary inference that the parties being illegally arrested, must be immediately discharged.

Not so was the answer of the Substitute Procureur General who appeared in support of the lawfulness of the warrant, indorsation, arrest and detention. The Court, was it said by the "Ministère Public", is not called upon to inquire into the power of the Australian Magistrate to issue the warrant indorsed by one of the Judges of this Court; nor to inquire whether the Australian Judicial Authorities have or have not the power to try the prisoners of the felony charged.

The Court has merely to enquire into the validity of the indorsation of the warrant by the Judge who granted the same and whether there is a sufficient cause or not for the further detention of the prisoners.

That a felony has been committed, there can be no doubt from the enactment of 5th. GEO. 4. That the Police Magistrate of Perth has power to issue a warrant for the apprehension of the felons therein referred to, appears from the very fact that he, and he alone, has the means of ascertaining the non-presence of ticket-of-leave men on the spot where they have been located. From the moment of their leaving the locality assigned to them, whether to go in another part of the District of Perth or beyond the sea, the offence is committed, and the power to issue a warrant for their apprehension comes into existence and may be exercised; were it otherwise the 5th. GEO. 4. would be a dead letter, and so also the 6TH AND 7TH VICT., C. 84. enacted with the view of remedying a failure of Justice by the escape of persons charged with felonies in one of Her Majesty's Colonies, into another of Her Majesty's Colonies, and whereby it is provided "that it "shall not be lawful for any person to indorse "his name upon any such warrant, for the pur- "pose of authorizing the apprehension of any "person under this Article, unless it shall appear, "on the face of the said warrant, that the offence "for which the person, for whose apprehension "the said warrant has been issued, is charged to "have committed, is such that *if committed within* "*that part* of Her Majesty's dominions *where* the "warrant *is so endorsed*, it would have amounted "in law to a treason *or some felony*, or unless "the depositions appear sufficient to warrant the "committal of such person for trial." The face of the warrant discloses an offence qualified by 5. GEO. 4. C. 22. to be a felony.

Hence not only was the Judge who gave the indorsation now quarrelled, warranted in granting the same, but bound in law to do so.

But the applicability of ART. 5 & 6, VICT. C. 34 to this case, has been denied.

It provides, however, for all offenders escaping from one Colony to another of Her Majesty's Colonies without any distinction being made between convicts and unconvicted offenders. The convict guilty of a second offence, is no less an offender, and, as such, within the wording and spirit of the 5 & 6 VICTORIA C. 34; and surely a man convicted of a second offence is less deserving of the laws' protection than one merely charged with a first offence of which he may not ever be convicted.

Next it was said that assuming the 5TH GEO. 4. C. 84; and the 6TH AND 7TH VICT. CHAP. 34 to apply to all and every British Colony, still would they be inapplicable to this Island, for want of due promulgation.

The answer to this objection is to be found in the Royal Order in Council of the 6*th November* 1832, 1*st paragraph*, which whilst providing that the laws made for the administration of the subjects of Her Majesty in the Island of Mauritius shall be in force as soon as they shall be known by the inhabitants of the Colony, by way of a Proclamation or other public notice, which said laws shall be published by the Governor, makes the following exception: "Provided, however, "that nothing in these presents shall extend to "any act relative to the said Island, made or to "be made by Her Majesty with the advice and "consent of Parliament, of which, execution in "the said Island shall begin and have effect from

" such a period as is, or may be, in like cases, " determined by Law."—(ROUILLARD'S *Code of Mauritius Laws* 4. *Vol. p.* 54—55.)

JUDGMENT.

However desirable it might have been that the Order in Council just quoted should have been more explicit as to the mode of promulgating an act of Parliament to render it binding on the inhabitants of this Island, certain it is that the mode traced out for the promulgation of the other laws referred to in the Order in Council, in no wise applies to the acts made by Her Majesty with the advice and consent of Parliament.

However desirable again it may be that the acts of Parliament applicable to this Colony should be published for the information of the inhabitants of this Island, yet we cannot admit for one instant that the accidental non-publication thereof can relieve the Court from applying an act of the Imperial Legislature extending to all British Colonies.

THE 5TH. GEO. 4. C. 84. SEC. 22. declaring on the other hand, that an offender found unduly at large within any part of His Majesty's dominions before expiration of his sentence shall, on conviction, suffer death as in cases of felony, without benefit of clergy, and on the other hand 5TH & 6TH VICTORIA C. 34 *Sections* 2 & 10, empowers one of the Judges of Her Majesty's Superior Court of Law, where the person shall be, to endorse the warrant issued by a person having lawfull authority to issue the same for the apprehension of the party charged, provided that it shall appear on the face of the warrant, that the offence charged to have been committed is such that if committed within that part of Her Majesty's dominions where the warrant is so endorsed, it would have amounted to a felony, or unless the depositions appear sufficient to warrant the committal of such person for trial.

The offence charged may not, it is true, amount by any special article of our Colonial *Penal* Code to a felony, or to a crime, but the merit of the warrant is not to be judged of by our Code of Criminal Laws alone, but by another law also, viz: the 5TH GEO: 4. C. 84 equally binding upon the Judges of the Island. The offence charged against the prisoners is by the Statute dealt with as a felony without benefit of clergy, and this made it imperative upon the Judge in this Colony to endorse the warrant presented to him in obedience to the 6TH & 7TH VICT. C. 34, ARTS. 2 & 10, such warrant having been issued by one having lawful authority to issue the same.

We therefore support the indorsation complained of. E. PELLEREAU will take nothing by his motion, and the prisoners must be remanded, and they are hereby remanded, accordingly.

ALPHABETICAL LIST OF MATTERS.

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ALPHABETICAL LIST OF MATTERS.

(1869.)

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